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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79–

FREDERICK JOSEPH G.,
Petitioner,
v.
THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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Petitioner, Frederick Joseph G., respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fifth Appellate District.[1] Judgment became final and was entered on October 24, 1979, following the issuance of an opinion on August 24, 1979.

OPINIONS BELOW

The opinion of the Court of Appeal affirming petitioner's conviction before a juvenile court upon a charge

[1] The Court of Appeal for the State of California, Fifth Appellate District, will be referred to hereafter as the Court of Appeal.

of murder was filed on August 24, 1979, and is reported at 96 Cal.App.3d 353, ___ Cal.Rptr. ___. The opinion is reproduced as Appendix "A." A timely petition for discretionary review was thereafter filed in the California Supreme Court on September 27, 1979. That court filed an order denying review on October 18, 1979,[2] and the judgment of the Court of Appeal became final on October 24, 1979.[3] (Cal. Rules of Court, rules 25, 28.)

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Where a state places an individual in jeopardy of penal confinement during his adulthood—potentially of lifelong duration—for a crime allegedly committed during his minority, do the Sixth and Fourteenth Amendments' guarantees of trial by jury apply to the proceedings?

2. Does a state comply with the "due process" and "equal protection" requirements of the Fourteenth Amendment where it remolds its laws relating to the prosecution of minors for crime to expressly provide for the assignment of moral responsibility and blameworthiness, but withholds same right of trial by jury which it staunchly guarantees to those accused of even the pettiest crimes during their majority?

[2] The order of the Supreme Court of California denying discretionary review is reproduced as Appendix "B."
[3] The judgment is reproduced as Appendix "C."

3. Does a state appellate court comply with last term's decision in *Jackson* v. *Virginia*[4] where it upholds the conviction of an individual for a grave offense based upon a mere modicum of evidence provided by an accessory to the crime whose incredibility was openly declared by the trial judge, and whose version of the crime was contradicted as to virtually every surrounding detail the witness' own prior statements and by other witnesses called by the prosecution?

(a) Does *Jackson* v. *Virginia* permit a state first-level reviewing court to refuse to take cognizance of the whole record of evidence once it discovers the first scintilla of incriminating evidence which is not "impossible" in the sense that it violates the laws of science?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments, which provide in pertinent part:

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

Amendment XIV:

Sec. 1. ". . . no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4] (1979) ___ U.S. ___, 99 S.Ct. 2781.

STATEMENT OF THE CASE

This case arises from an incident which took place in Bakersfield, California, on March 14, 1978.[5] At 8:00 a.m. on that date, the body of one Liz Moore was discovered at a crossroads inside the grounds of a local cemetery. An elastic belt was tied about the victim's neck, and there was a laceration above the right ear. The county coroner testified that death was caused by asphyxiation and multiple traumatic injuries.

Based solely upon statements made by one Connie Balderas, allegedly present at the scene, petitioner alone was prosecuted in the juvenile court. Another (adult) individual, Lillian Ortiz, was necessarily guilty as a co-principal under Balderas' version of the facts and was taken into custody; prosecutors never proceeded against her for the reason they considered the evidence insufficient to present to a jury.[6]

Prior to her courtroom testimony, Ms. Balderas had told several differing stories concerning the murder to the authorities. She had stated at one point that Lillian Ortiz alone had done it; at another, she said it was a "black guy." Balderas had first denied seeing anything at all; she admitted being under the influence of heroin at the time.

Balderas had been promised help in relocating out of

[5] Because the appended opinion of the Court of Appeal engages in a lengthy discussion of the facts, our synopsis of them here is condensed and focuses on certain facts in the record which were not stressed by the court.

[6] The deputy district attorney who prosecuted this case has subsequently stated publicly that the same testimony used to convict petitioner in juvenile court was deemed "insufficient evidence" to present against any adults. ("Prosecutor Says Verdict Right Even If Not Enough Evidence For Jury Trial," *The Bakersfield Californian*, December 4, 1979, Part B, pg. 2, col. 1–4.)

state and intercession on behalf of a jailed boyfriend in exchange for testitying against petitioner. Balderas was shown to have a motive for revenge against petitioner and his brother, having expressed a desire to kill them with "hand grenades" for allegedly cheating her in some type of drug transaction. Balderas had also herself engaged in a past altercation with Ms. Moore, in which she had stabbed Moore with a knife.

In court, Balderas stated that a fight had broken out between Ms. Ortiz and Ms. Moore, and that petitioner had intervened by "lassoing" Moore with a belt. She admitted, however, that she never saw petitioner do this. Ortiz then kicked Moore in the head, and everyone piled in a car driven by petitioner's brother which ran over the body. Balderas stated she got out of the car and returned to the victim where she attempted to loosen the belt around Moore's neck by turning it 180 degrees. Another explanation for this mission of asserted mercy might be found in the fact she realized she left her shoe at the scene. After returning, Balderas admitted to lifting up Moore's blouse, evidently so as to inspect the size of her breasts.

Balderas claimed to have seen these events in the glow of a pole light located inside the cemetery. The superintendent of the cemetery testified, however, that there were no such lights present. The county coroner added that it would have been impossible for the belt around Moore's neck to have been turned around as described without leaving lacerations. The pattern of injuries was also inconsistent with the body having been

run over by a car as Balderas had testified.

A young woman named Sandra Garcia testified that she had looked into the cemetery at the time of the murder, saw two women fighting, one of whom then fell silent to the ground. She did not see any male intervene in the fight, and did not state petitioner was even there. Earlier that day, she had seen Moore at a K-Mart store in the company of another man who was not petitioner. Other witnesses also testified that Moore was in the company of persons other than petitioner prior to her murder.

Petitioner presented evidence of an alibi; as well as evidence he did not own any belt similar to that used in the murder.

At the conclusion of the case, the trial judge remarked openly that he believed very little of Balderas' testimony, save for the one passage where she incriminated petitioner; he remarked that he was under no compulsion to explain why.

The Court of Appeal upheld the conviction on the theory that this one passage was not inconsistent with the laws of physics, and refused to take cognizance of the rest of the evidence. Petitioner's assertion of a right of trial by jury was also rejected. (App. "A" p. 13.)

REASONS FOR GRANTING THE WRIT

I

SINCE CALIFORNIA HAS CHOSEN TO IMPOSE MORAL CONDEMNATION AND PUNISHMENT

UPON JUVENILES WHO COMMIT MAJOR CRIMES, AND TO EXTEND IT FAR INTO ADULTHOOD, THE TRIAL OF AN OLDER YOUTH FOR A MAJOR CRIME IS A "CRIMINAL CASE" WITHIN THE MEANING OF THE SIXTH AMENDMENT

This Court has observed on many occasions that

> "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors as well as adults are protected by the Constitution and possess constitutional rights. [Citations]" *Planned Parenthood* v. *Danforth* (1976) 428 U.S. 52, 74.

The Court has also spelled out over the last decade or so a rough formula for determining exactly how much "process" is "due" a citizen who happens to be a minor in a given context. In harmony with the general development of the concept of due process [7] it can be generalized that the amount of "process" due—or the amount of "protection" which is "equal"—depends upon the nature of the actual consequences at stake in a given proceeding, not upon wooden labels. (Cf. *McKeiver* v. *Pennsylvania* (1971) 403 U.S. 528, 542.)

Thus, where the matter at hand is a parent's exercise of his obligation to provide needed psychiatric or medical care for his minor child, that exercise need be surrounded by very little in the way of formal legal process, even if the parent seeks state-administered care. *Parham* v. *J.R.* (1979) ____ U.S. ____, 99 S.Ct. 2493:

[7] See, e.g., *Goldberg* v. *Kelly* (1970) 397 U.S. 254.

> "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and judgment . . . [n]atural bonds of affection lead parents to act in the best interests of their children" ____ U.S. at ____, 99 S.Ct. at 2504.[8]

But where, as here, the state seeks to impose not only a "massive" but an overtly punative curtailment of liberty upon a citizen because of his commission, while a minor, of a criminal offense, the task of interest-balancing takes on different dimensions. Because of the grave implications of incarceration in training schools and reformatories, the Court has taken pains to insure that the finding of facts be done in a fair manner (*In re Gault* (1967) 387 U.S. 1), and has extended protection to minors from involuntary "rehabilitation" where a reasonable doubt as to their guilt exists. (*In re Winship* (1970) 397 U.S. 358.) It is important to note that the Court has insisted on such a standard of proof for juveniles facing "rehabilitation" for crimes, (*Id.*) but has allowed a lesser standard for adults who face involuntary hospitalization not predicated upon commission of a crime. (*Addington* v. *Texas* (1979) ____ U.S. ____, 99 S.Ct. 1804.)

The Court has, however, so far drawn the line in the extension of "criminal" due process rights within the traditionally-constituted juvenile court at trial by jury. The reasoning behind this conclusion has been that the vital and indispensable role played by the jury in accurate criminal factfinding (*Duncan* v. *Louisiana* (1968)

[8] When matters of parental discretion on behalf of their children are considered, moreover, the situation is often colored by the fact the parents' discretion may constitute an exercise of *their own* constitutionally protected rights. (See *Wisconsin* v. *Yoder* (1972) 406 U.S. 205.) Such considerations are decidedly absent here.

391 U.S. 145) is dispensable in traditional juvenile proceedings because they eschew blameworthiness. Instead, they operate to correct deficiencies in the minor's environment rather than to impose disabilities for the sake of public protection or deterrance. (*McKeiver* v. *Pennsylvania* (1971) 403 U.S. 528.) As Mr. Justice White put it in his concurring opinion,

> "The criminal law proceeds on the assumption that defendants have a will and are responsible for their actions. A finding of guilt establishes that . . . they must be punished in order to deter them and others from crime. . . .
>
> ". . . Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control . . . his conduct is not deemed so blameworthy that punishment is required to deter him or others . . . supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties." 403 U.S. at 552–553 (conc. opn.).

Because the California juvenile court law, at least as it relates to murder and other major felonies committed by minors over age 16, no longer has the essential characteristics which this Court found crucial in *McKeiver*, to continue to withhold vital rights from a person facing frankly-imposed punishment for crime is to discriminate against the young merely *because* they are young. Whatever may have been true in Pennsylvania in 1971, the underlying facts of this case vividly demonstrate that such discrimination in the social climate of 1979 leads

factfinding to assume a dubious character, which does indeed dilute the moral force of the criminal law by leaving people in doubt as to whether the innocent are being condemned. (*In re Winship, supra,* 397 U.S. at 365.) [9]

a. Trial By Jury *Is* Necessary To Adequate Factfinding In A Prosecution For A Grave Offense Such As Murder, Regardless Of The Age Of The Accused.

> ". . . When you have a situation wherein you have a jury, and you have to explain to the jury every small aspect and tie up all the small loose ends, you tend to be extremely thorough . . . But, unfortunately, when you get into a situation where you have a juvenile court, and you have 18 to 20, 25 adjudications on a calendar a day you tend to get the assembly-line fever to try to push them through."[10]

It was the prosecution's theory at trial that petitioner assisted Lillian Ortiz in accomplishing the murder of Liz Moore. If the evidence relied upon by the state to convict petitioner was in fact the truth, then Ms. Ortiz is also necessarily guilty as a co-principal.

Ortiz was never prosecuted.

This can only be explained by the fact that Ms. Ortiz was over the age of 18 years, and that the prosecutor

[9] That the conviction of Joey Grijalva has left perhaps an entire community in doubt is dramatically illustrated by the fact that more than a year after his trial, local newspapers are publishing articles questioning the verdict against him. (See "Joey, Killer or Judicial Victim," *The Bakersfield Californian,* December 3, 1979, Part B, pg. 2, cols. 2–5.)

[10] This portion of a prosecutor's argument was read from the transcript of a juvenile trial by the chairman of the California State Bar's Committee on Juvenile Justice at a recent legislative hearing. (Cal. Legislature, Assembly Committee on Criminal Justice, Hearing on Juvenile Court Law, October 9, 1979, pg. 75) (Hereafter designated "Assembly Hearing").

well knew he could not convince a jury to believe the same testimony he used to convict petitioner in juvenile court.[11] The difference in the quality of jury factfinding is demonstrated by the fact, as represented by the California Judicial Council, that a full 6% of all juvenile cases certified for adult trial are not even *filed* by prosecutors after a reassessment of their sufficiency under jury standards. (*Assembly Hearing,* 121.)

There can be no more conclusive proof than this that there is indeed a substantial difference in the quality of jury factfinding in major felony cases.

We are, of course, familiar with the statements in *McKeiver* v. *Pennsylvania, supra,* that the jury trial, if injected into the juvenile court, might make proceedings therein "fully adversary" (403 U.S. at 546), that they might introduce "formality" and the "public trial" (403 U.S. at 551) and, above all, that "the jury trial would not strengthen greatly, if at all, the factfinding function . . . ." (403 U.S. at 548.)

This analysis, though it has been roundly criticized by many, may yet be correct and acceptable in a proceeding where the factual focus is, *in fact,* upon "environmental concerns" and where the dispositional focus will be exclusively upon "providing care and guidance, preferably in [the minor's] own home, as will serve the spiritual, mental and physical welfare of the minor. . . ." As Mr. Justice White again put it,

> "To the extent that the jury is a buffer to the corrupt or overzealous prosecutor . . . the distinctive intake policies and procedure of the juvenile court to a great extent obviate this important function of the

[11] Petitioner easily could have been ordered tried as an adult (Cal. Welf. & Inst. Code § 707) had the prosecutor believed his case was strong enough to convince a jury. (See fn. 6, *ante.*)

> jury. As for the necessity to guard against judicial bias, a system eschewing blameworthiness and punishment for evil choice is itself an operative force against prejudice and short-tempered justice." (403 U.S. at 553.)

None of these features are any longer operative when a minor is being prosecuted for murder in a California juvenile court.

For example, the trial of a juvenile for murder has been squarely held to be "adversary in every sense of the word" (*In re Julius B.* (1977) 68 Cal.App.3d 395, 406, 137 Cal.Rptr. 341). Such a trial is "formal" when a contested issue of fact is being adjudicated. (*People* v. *Superior Court* (Carl W.), (1975) 15 Cal.3d 271, 277–278, 124 Cal.Rptr. 47.) The proceeding may be, moreover, a "public trial" in that the news media can be admitted to the proceedings over the minor's objection. (Cal. Rules of Court, rule 1311(e); *Brian W.* v. *Superior Court* (1978) 20 Cal.3d 618, 143 Cal.Rptr. 517.)

The "distinctive intake" policies which were present in both Pennsylvania and California in 1971 are not present in California in 1979. Now, criminal prosecutors who act on behalf of "the People of the State of California" exercise final control over intake and filing decisions. (Cal. Welf. & Inst. Code §§ 650(b), 655(a).)

Most important, as we point out in greater detail in subdivision (b), *post,* since the California juvenile court during a major felony prosecution is no longer a "system eschewing blameworthiness and punishment," it provides no "operative force against prejudice and short tempered justice" (403 U.S. at 553) sufficient to displace

the jury.

It follows directly that the prosecution of a juvenile for a major felony in California now bears sufficient (if not indeed total) resemblance to a "criminal case" as to make the jury a very essential element of accurate fact-finding. (*Duncan* v. *Louisiana* (1968) 391 U.S. 145.)

1. A Well-Organized And Effective Political Campaign By California Prosecutors To Remove Judges Who Displease Them From Office Underscores The Indispensibility Of The Jury To Accurate Factfinding In Serious Cases.

> "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and to protect against judges too responsive to higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge. (*Duncan* v. *Louisiana, supra* at 156.)

The prescience of the above-quoted language is being demonstrated in California today by an ongoing, organized campaign by "overzealous prosecutors" (or perhaps just ambitious prosecutors) to force the trial judiciary of this state to heel to their commands. As one such prosecutor recently stated publicly, "I believe every judge should be opposed. Everytime. Every judge." This was the same individual who placed ads in newspapers in 1978 soliciting persons to run against judges on a "law and order" platform.[12] His efforts then were sufficiently successful that many highly respected and competent trial judges were turned out of office as "soft on

[12] "Judges Can Expect Challenges in 1980, Says Los Angeles Prosecutor," *Los Angeles Daily Journal,* September 18, 1979, p. 1 cols. 2–4.

crime," even some who had *never presided over a criminal case.* In 1978, over two million dollars was spent by candidates for judicial office in California, and it is predicted that a full 30 to 60 incumbents in Los Angeles County alone will be challenged in 1980.[13]

Whether it is in a metropolis like Los Angeles or a smaller city such as Bakersfield, a judge must know that by declaring a reasonable doubt in very many cases where there is "any" evidence, he will run the risk of being targeted for electoral challenge. Whether the challenge is successful or not, the result may well be personal financial ruin for the judge.

> "Notice is being served that hereafter every judge in the state may become susceptible for the same political pressure as every other candidate for public office this year. Every superior court judge up for reelection . . . is being examined under a microscope by a pro-prosecutor organization. . . . Those who do not meet the standards of [the] Law and Order Campaign Committee will find themselves needing to run expensive campaigns to defend their records against high-powered opposition." Salzman, "Superior Court Hit List: Richardson's Attack on Judges: Most Significant June Ballot Issue"? (December, 1979) 10 *California Journal* 424.

We in no way seek to demean the courage and integrity of California's trial judiciary—the ambitious prosecutors are doing enough of that. Nevertheless, it is simply unrealistic to pretend any longer that mortal men, faced with this kind of pressure, will not be affected by it or that the effect will somehow be blunted by merely professing a concern for "environmental" fac-

[13] The "Election of Judges" (Editorial), *The Sacramento Bee,* September 23, 1979, Forum section, pg. 2, cols. 1–2.

tors.

It was the same realization, of course, which led the framers of our Constitutions to guarantee the right of trial by jury to *all* accused persons, not just those of a certain age.

It is thus both folly in terms of preservation of an independent judiciary, and a disservice to a public entitled to verdicts of guilt or innocence which are unimpeachable and accurate, to continue to fail to recognize that the right to be tried by a jury which won't be standing for reelection is essential to accurate factfinding in serious felony cases.

b. The California Juvenile Court Law Now Provides For The Criminal Punishment Of Minors Guilty Of Major Felonies.

When *McKeiver* v. *Pennsylvania* was written, former California Welfare & Institutions Code Section 502 [14] specified (similar to 1971 Pennsylvania law) that the sole purpose of the juvenile court was to provide "such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental and physical welfare of the minor . . . removing him from the custody of his parents only when necessary for his welfare. . . ."

By a series of legislative amendments in 1976 and 1977, punishment has been added to this list of purposes.

It is now specified that the juvenile court should "impose on the minor a sense of responsibility for his own acts," and, most significantly, that minors may be incarcerated solely for purposes of the "safety and protection of the public." (Cal. Welf. & Inst. Code § 202 (a).) For extra emphasis, a new subdivision (b) was added to say,

[14] New recodified as Section 202.

"The purpose of this chapter also includes the protection of the public from the consequences of *criminal* activity." (Emphasis added.)

It has been squarely held by this Court that where a person is deprived of liberty in order to quarantine him and thereby protect the public from his future conduct, such confinement is punishment; and that is no less so merely because "rehabilitation" is allegedly attempted during the confinement:

> "Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." (*United States* v. *Brown* (1965) 381 U.S. 437, 458.)

In 1975, this Court unanimously applied similar reasoning as to a proceeding under California's juvenile court law:

> " 'Nor does the fact that the purpose of the commitment is rehabilitative and not punative . . . change its nature . . . regardless of the purposes for which incarceration is imposed, the fact remains that it is incarceration. The rehabilitative goals of the system are admirable but they do not change the drastic nature of the actions taken. Incarceration of adults is also intended to produce rehabilitation' (citations omitted)." (*Breed* v. *Jones* (1975) 421 U.S. 519, 530, fn. 12, *quoting In re Winship, supra* 397 U.S. at 367.) [15]

[15] Judge Irving Kaufman, commenting on the recently-issued ABA standards for juvenile justice, has noted "In cases of Juvenile delinquency, the standards frankly recognize that while reform schools have rehabilitative goals, they are dominated by their punative aspect. Cliches about saving a child . . . do not alter the stark reality—*and necessity of*—punishment. . . . [J]uveniles accused of crime should have the right to the same adult procedural protections that guard against conviction of the innocent. Consequently the standards accord juveniles . . . a six person jury. . . ." (Kaufman, "Juvenile Justice: A Plea for Reform." *The New York Times Magazine,* October 14, 1979, 42, 60.)

That punative purposes dominate California's juvenile court law as much as its adult criminal law is further illustrated by the fact that the statutory purposes of California's notorious San Quentin and Folsom prisons, which are unarguably institutions of punishment, also include "training and treatment." (Cal. Pen. Code §§ 2022, 2032.) It is equally well illustrated by the fact that a minor sentenced to the California Youth Authority [16] may be administratively transferred to a prison institution operated by the California Department of Corrections and placed among the general felon population. (Welf. & Inst. Code § 1755.5.)

Once sent to the Youth Authority, above all, a person is *no longer under the jurisdiction of the juvenile court* (*In re Arthur N.* (1976) 16 Cal.3d 226, 237–238, 127 Cal.Rptr. 641); so, for example, the juvenile court may not substitute its judgment in place of the Authority's regarding parole (*Breed* v. *Superior Court* (1976) 63 Cal.App.3d 773, 778, 134 Cal.Rptr. 228.) The juvenile court may not even vacate its own commitment to the Authority based on new evidence that the minor's rehabilitative needs may be better served elsewhere. (*In re Owen E.* (1979) 23 Cal.3d 393, 154 Cal.Rptr. 204.)

Once the Authority acquires jurisdiction over a minor, it makes its decisions concerning imprisonment and parole "under such conditions as [the Authority] believes best designed for the *protection of the public*" [Cal. Welf. & Inst. Code § 1766(a)] (emphasis added).

[16] For brevity, the California Youth Authority is sometimes hereafter referred to as "The Authority."

Since the enactment of these legislative changes, California courts have lost little time in recognizing their importance. For example, in *In re Maurice S.* (1979) 90 Cal.App.3d 190, ___ Cal. Rptr. ___, the Court of Appeal granted a minor certain credits against his juvenile sentence comparable to those an adult would receive, noting that "The Supreme Court treated *punishment* as the primary purpose for juvenile confinement. . . ." (*Id.* at 194) (emphasis added). The California Supreme Court thereafter denied a petition for review, and later reached the same result on the merits in another matter. (*In re Eric J.* (1979) 25 Cal.3d 522, ___ Cal. Rptr. ___.)

In *In re Donald B.* (1979) 89 Cal.App.3d 804, 152 Cal.Rptr. 868, the court dealt with an individual who was serving an adult penal sentence for crimes committed during his majority. The court permitted the juvenile court to impose additional sentences for crimes committed when Donald B. had been a minor, ignoring an argument that it was impossible for the juvenile court to "rehabilitate" someone while he served time in an adult jail. The court held it to be intolerable for a former juvenile to "use the adult crime as a means of escaping *punishment* for the juvenile offenses" and agreed with the trial court that Donald B. is "entitled to get what he deserves in [the juvenile] court." (89 Cal.App.3d at 807.) (Emphasis added.)

Finally, in *In re Gregory S.* (1978) 85 Cal.App.3d 206, 213, 149 Cal.Rptr. 216, the court observed that the "long overdue objective of juvenile justice" contained in the above-described punative amendments was correctly relied upon as support for the commitment of a thirteen-

year old first offender to the Authority.

The California Supreme Court denied petitions for review in both *Donald B.* and *Gregory S.*

We offer no criticism of either the California Legislature nor of the public which elects it for demanding that the state's response to violent crime by minors *not* be limited to a mere examination of "environmental pressures." But just as it is the state Legislature's prerogative to change the juvenile court law in this way, it is its constitutional responsibility if it does so to assure those facing punishment a trial adequate under the Sixth Amendment.

c. The Rationale Of *McKeiver* v. *Pennsylvania* Is Inapplicable To Proceedings Which Lead To Incarceration, Often Next To Adult Offenders, For As Long As *Five Years* Past The Attainment Of Majority.

As stated above, the rationale of *McKeiver* v. *Pennsylvania* boils down to the proposition that full "criminal" due process safeguards need not apply to a proceeding where the state seeks to substitute itself for a minor's parent in discharging the essentially nurturative duty of educating and preparing the minor for adulthood. (Very significantly, the Pennsylvania statute did *not* authorize incarceration past attainment of majority.) The state's interest in the discharge of its duty as *Parens Patriae* is thus a "compelling" one which justifies differential treatment.

As even the *McKeiver* court had to recognize (403

U.S. at 535) this reasoning is vulnerable to the often obdurate refusal of state governments to provide the resources needed to make the theory a reality, a refusal which continues unabated almost a decade after the decision.[17] For the purposes of this case, however, we may assume, arguendo, the validity of the *McKeiver* rationale without lessening the truth that petitioner has been subjected to criminal punishment without a proper criminal trial. *McKeiver* is simply inapplicable to this case because California has initially sentenced petitioner to incarceration for as long as *five years during the period of his adulthood,* to age 23 [Cal. Welf. & Inst. Code § 1769(b)], subject to indefinite renewal under California Welfare & Institutions Code section 1800 ff.

The compelling state interest defined in *McKeiver* ceases to exist at the point where the state embraces punishment or where it extends incarceration past the period of minority. Whenever either event occurs, the Court no longer need inquire whether enforcement of a given constitutional guarantee will "compell the states to abandon or displace any of the substantive benefits of the juvenile process" (*In re Winship, supra,* 387 U.S. at 21), for the state has abandoned those "benefits" by its own deliberate choice.

1. Age 18 Is The Beginning of Adulthood And The End of Any *Parens Patriae* Interest Of The State.

[17] As late as Decmeber, 1979, conscientious juvenile court judges still could do no more than meekly bemoan the lack of treatment resources. As Richard P. Byrne, the Presiding Juvenile Judge for Los Angeles County put it in a letter to the Editor: ". . . It's paradoxical that at a time when governmental officials perceive the juvenile crime problem to be getting worse that problems such as the county's outstanding camp program are cut back. . . . Talk is cheap. Programs cost money. . . ." ("Juvenile Justice System in L.A.," Letters to the Times, *Los Angeles Times,* December 6, 1979, Part II, pg. 6, col. 5.)

As Mr. Justice Black pointed out in his lead opinion in *Oregon* v. *Mitchell* (1970) 400 U.S. 112, 143,

> "[Eighteen year olds] are generally considered by American law to be mature enough to contract, to marry, to drive an automobile, to own a gun, and to be responsible for criminal behavior as an adult. Moreover, we are advised that under state laws, mandatory school attendance does not . . . extend beyond age of 18."

Following this observation, Congress and the states further made clear that age 18 was to be the dividing line between minority and adulthood by promulgating the Twenty-Sixth Amendment to the Constitution. Much in direct consequence of this fact, the California Legislature acted to fix the age of majority at 18 effective March 4, 1972,[18] i.e., roughly nine months after the decision in *McKeiver* v. *Pennsylvania* had been filed. These statutory changes specifically included a drop in the age of juvenile court jurisdiction to 18; previously, it had been permissive up to age 21. (*Ibid.*)

As we have pointed out, California has gone even further than imposing confinement past age 18: it imposes it to *age 23* upon adults found to have committed enumerated major crimes while during their minority. [Cal. Welf. & Inst. Code §§ 707(b), 1769(b)], and this period may be further extended *indefinitely* by an order for further detention pursuant to California Welfare & Institutions Code section 1800.

[18] Cal. Civil Code § 25.1; Cal.Stats. 1971 ch. 1748; Cal.Stats. 1972 ch. 84.

". . . [T]he sentencing court's understandable desire to impose a substantial period of confinement for society's protection could have been amply fulfilled by a Youth Authority Commitment. . . . Indeed, should defendant thereafter remain dangerous to the public, the Youth Authority would have the authority to establish grounds for an extended commitment (Welf. & Inst. Code § 1800) in comparison, defendant's confinement to state prison in all probability would not extend . . . beyond a Youth Authority commitment." (*People* v. *Carl B.* (1979) 24 Cal.3d 212, 219, ____ Cal.Rptr. ____.)

It is well to recall at this point that the appellant in *Duncan* v. *Louisiana* was age 19 and was placed in jeopardy of two years' imprisonment for simple battery; had he received the maximum sentence, Duncan would have been released at age 21. In our mind, the bounds of reason are tested considerably when one tries to explain why petitioner, facing at least *five* years of adult confinement, should be entitled to fewer rights than was Mr. Duncan.

2. California Appears To Go Further Than Any American Jurisdiction In Its Extension Of Punishment Into Adulthood.

We know of no American jurisdiction—including Pennsylvania in 1971 (see Penn. Ann. Stat. Title 11 § 750 [1971])—which keeps persons incarcerated beyond their majority for crimes committed during their minority without affording them a jury trial, and we are particularly unaware of any such jurisdiction which does so while guaranteeing a jury to those over age 18 who face

as little as a $100 fine. (*Tracy* v. *Municipal Court* (1978) 22 Cal.2d 760, 150 Cal.Rptr. 785.)

The federal Juvenile Delinquency Act, for example, specifies that commitment may not extend beyond the maximum term which could have been imposed upon as adult or age 21, whichever comes first. [18 U.S.C. § 5037(b)].[19] Moreover, a juvenile proceeded against under the federal act has a right, unlike petitioner, to demand to be treated as an adult, with attendant rights to a jury trial (18 U.S.C. § 5032).

Perhaps above all, unlike his California counterpart, a federally-adjudicated juvenile delinquent may not be placed in any correctional institution in regular contact with persons convicted of crime as adults. (18 U.S.C. § 5039.)

II

THE COURT OF APPEAL HAS MANAGED TO CONSTRUE *JACKSON* v. *VIRGINIA* AS PERMITTING THE AFFIRMANCE OF CONVICTIONS WHERE THERE IS MERELY ANY EVIDENCE OF GUILT, AND HAS THUS IMPROPERLY UPHELD PETITIONER'S CONVICTION NOTWITHSTANDING THE EXISTENCE OF A REASONABLE DOUBT AS A MATTER OF LAW

It is quite clear that despite its elaborate disclaimers, the Court of Appeal has examined the record of petitioner's trial and upheld his conviction because it found a mere modicum of evidence to support it. In one quick

[19] As was brought out in the debate surrounding the lowering of the voting age, age 21 has been recognized as the outside limit of minority since at least the eleventh century. (See 1971 U.S. Code Cong. & Admin. News at 365–367.)

stroke, *Jackson* v. *Virginia* has thus been wrestled to the ground in California. Especially given trials without juries, this may well mean that factually innocent defendants are guaranteed only as much protection as the unreviewable whim of an individual judge wishes to afford.

The constitution, we think calls for more than this.

At page 18 of its slip opinion [20] the Court of Appeal makes the following statement:

> ". . . [Petitioner] impliedly implores this court to independently determine from the whole record whether the evidence was sufficient to conclude that appellant is guilty beyond a reasonable doubt. . . . [T]he appellate court will not uphold a verdict based upon evidence which is inherently improbable, and thus may reject evidence believed by the trier of fact if there exists either a physical impossibility that it is sure or the falsity of the evidence is apparent without resorting to inference or deduction. [Citations.] There is nothing in this record rendering Balderas' version inherently improbable, physically impossible, or legally unbelievable."

Prior to this passage, the court, while reciting that had reviewed the "whole record," had observed that "the testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent, or false as to other portions [citations]" (slip opn. at 17, app 1 at 19).

This standard of review is obviously indistinguishable from the "any evidence" standard which prevailed in California prior to this Court's decision in Jackson:

[20] App. 1 at 20–21.

> "[T]he court, under the strictures of the *any* substantial evidence rule, may consider only *some* of the evidence, i.e., that favorable to the prosecution. This "favorable" evidence, isolated and outweighed as it might be, . . . will support the guilty verdict so long as it is not a *"physical impossibility,"* or *on its face* without consideration of other evidence of inferences, "false." (See *People* v. *Lyons* [19] 47 Cal.2d 311, 320 [303 P.2d 329].) All of the remaining evidence, regardless of its convincing and impeaching force, must be rejected from consideration." (*People* v. *Blum,* 35 Cal.App. 515, 523, 110 Cal.Rptr. 833, [Elkington, J., concurring]).

It is thus unmistakable that while the Court of Appeal may have "reviewed" the "whole" record, they upheld petitioner's conviction because they merely found therein a modicum of evidence which was not on its face inconsistent with Newtonian physics. "Review" of a record is obviously meaningless if everything in it inconsistent with guilt is to be ignored.[21]

Since virtually *everything* else in this record points to the conclusion that Connie Balderas' version of the death of Liz Moore was a story woven from whole cloth, it is equally unmistakable that the Court of Appeal did not properly apply the teaching of *Jackson* v. *Virginia*

[21] That several appellate courts in California are playing games with *Jackson* v. *Virginia* is quite vividly illustrated by the opinions filed in *People* v. *Baldwin* (1979) 97 Cal.App.3d 396, 402–403, ___ Cal.Rptr. ___. Initially, and evidently unaware of the existence of *Jackson,* the court scoffed that "The argument made . . . suggests that California appellate courts . . . must instead determine whether a reasonable jury could have found proof beyond a reasonable doubt. . . ."

On October 15, 1979, the court, having been made aware of *Jackson* by a petition for rehearing, filed a modification of its opinion which stated, much like in the instant case, that the *Jackson* standard (which it had just explicitly rejected) always had been the law in California, and re-affirmed Baldwin's conviction (98 Cal.App.3d at 533a, ___ Cal.Rptr. ___).

and that it has permitted the conviction of a palpably innocent individual to stand.

A reasonable person, giving effect to the whole of this record, would necessarily experience a substantial "hesitation" in reaching a conclusion that Connie Balderas was telling the truth; such a hesitation is, of course, the essence of a reasonble doubt.[22] For this reason, the "any evidence" affirmance of petitioner's conviction was constitutional error.

CONCLUSION

We continue to cherish the belief that the Fourteenth Amendment's assurances of equal protection of the laws and of due process of law to those facing loss of liberty are meant to guarantee individuals something more than a hollow ritual. Clearly, a system which cannot confidently reach factually correct results in cases affecting vital human interests is worthless no matter how many procedural nicities are attached to it.

The unavailability of neither a jury nor meaningful appellate review, as here, create a constitutionally unacceptable risk that innocent persons will be convicted and condemned to punishment for grave offenses; the facts of this case place that risk in perfect relief.

Certiorari should be granted to correct the serious "design defects" in California system of adjudication of major criminal charges against the young which this case reveals.

DATED: December 21, 1979

Respectfully submitted,

[22] Devit and Blackmar, *Federal Jury Practice and Instructions* (1977) § 11.14.

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By _____
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APPENDIX A

5 Civil No. 4311
(Super. Ct. No. 44425)
Filed Aug. 24, 1979 [96 Cal.App.3d 353]

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDERICK JOSEPH G.,

Defendant and Appellant.

OPINION

APPEAL from a judgment of the Superior Court of Kern County, sitting as a juvenile court, finding jurisdiction and determining disposition. Walter Osborn, Jr., Judge. Affirmed.

Quin Denvir, State Public Defender, under appointment by the Court of Appeal, Ezra Hendon, Chief Assistant State Public Defender, and Laurance S. Smith, Deputy State Public Defender, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Edmund D. McMurray and Wm. George Prahl, Deputy Attorneys

General, for Plaintiff and Respondent.

Frederick Joseph G., a minor, aged 17 years, was found to be a person coming within the provisions of Welfare and Institutions Code section 602 in that he was guilty of murder in the second degree (Pen. Code, §§ 187, 189). He was committed to the C.Y.A. and appeals. The central theme of appellant's scenario is that the evidence was insufficient to support the trial court's judgment if the record is evaluated under the proper standard of review.

FACTS

Detective Singleton testified that on Tuesday, March 14, 1978, at about 8 a.m., he was called to the Union Cemetery in Bakersfield to investigate the murder of Liz Moore. He found the victim lying on her back in a spread-eagle fashion in a crossroads. She had on Levi's which were buttoned but unzipped. There was blood on her head and the pavement below, a laceration on her left ear and an abrasion on the left cheek area. There was also a laceration on the right side of her head above the ear. A black and brown elastic belt was tied around her neck. There were abrasions on her back also. Detective Singleton also testified that there were needle marks on the victim's arms, the ring on her left hand had been smashed and there was an abrasion on her right hand. A curb feeler from an automobile was found next to the victim's body.

At the trial Connie Balderas testified that on the night

before the murder (Sunday, March 12) the victim was at her house with someone named Chris, Frank G. (appellant's brother), Lillian Ortiz and appellant. She stated that they partied all afternoon, using heroin, angel dust and marijuana. She stated that they later left and went to El Montecito and La Capa, two bars, with Pete Ramirez. They couldn't get into the bars because Pete wasn't old enough, so they went back to Balderas' house. She testified that she got up at 7:30 the next morning (Monday, March 13) and she and the victim used heroin. She then left for work at a car wash.

After work, she saw the victim on the street. Balderas used heroin, and although she didn't see the victim use it she assumed she did.

Counsel stipulated that expert testimony would establish that blood and bile samples taken from the victim were tested and were found to not contain any traceable quantities of heroin. It was also stipulated that the expert would testify that it would be improbable that heroin would be completely eliminated from the bloodstream in only eight hours.

Balderas testified that she and the victim left to go to California Park and met Frank, Lillian Ortiz and appellant. They first went to K-Mart and the liquor store, then to Union Cemetery. At the cemetery, Frank G. and Lillian Ortiz had sexual intercourse. Appellant attempted the same with the victim, who later told Balderas he had been unable to accomplish the act. Appellant told her to "shut up" and seemed embarrassed by the victim's statement. The victim and Balderas teased appellant about

his inability to perform sexually.

Balderas testified that the victim and Lillian Ortiz got into a fight over Balderas' boyfriend. The fight started when the victim began kidding with Lillian that she had had sexual intercourse with Balderas' boyfriend. The victim took off her belt and hit Lillian with it. Lillian then asked appellant for his belt, and he gave it to her. The two women began fighting with the belts. Balderas got between Liz and Lillian and asked them to stop fighting. Liz tried to get away from the fight by running. Appellant, however, began running after Liz cussing at her. Appellant said he was going "to show this bitch how to run." Appellant lassoed Liz around her neck with the belt he had taken off and given Lillian. Liz fell to her knees and fought with appellant to get the belt off her neck. Balderas pulled at appellant's hair and tried to pull him away from Liz. Meanwhile, Lillian kicked Liz Moore in the cheek. Liz then fell to the ground on her stomach and stopped fighting. The belt was around her neck with a knot tied in the back. Balderas did not see appellant actually tie a knot around the victim's neck. However, Balderas never saw Lillian in a position to have knotted the belt around Liz Moore's neck. After Liz had fallen to the ground, appellant said "Oh, my God, I've killed her."

Balderas stated that everyone then got in the car and ran over the victim, which turned the body over so she was on her back.

Balderas testified that after the rest of the group left the cemetery she got out of the car and returned. She

picked up the victim and twisted the belt around to try to loosen it so as to "help her out."

Several days later, appellant, Frank G. and "Fat Eddie" came to her house to clean the car, but Ms. Balderas refused to let them. Lillian Ortiz, Frank G. and appellant came later to discuss their stories regarding the incident.

Balderas stated she called the police a day or two after the murder and about a month later but didn't tell the officers the truth because she was scared. The first time she told the officer that she believed Lillian Ortiz to be responsible for the murder. On the second occasion she told the police that decedent had "burned" some people over a quantity of heroin and that several days before the homicide appellant and Frank G. had been at Connie's house and had said they would get the victim for that.

When questioned regarding promises made to Balderas while interrogating her, Detective Singleton testified that he told her she wouldn't go to jail if she was not involved in the actual homicide and that if she wanted to leave town the police would assist her. When questioned as to promises made regarding her boyfriend who was incarcerated, Detective Singleton replied: "I told her that at the conclusion, if she wanted to to go Texas, we would send her to Texas if we could and also we would send Benny if she wanted him to go or to assist." Balderas was not given immunity from prosecution for the crime. During the trial she was extended immunity as to her admission about heroin use only.

Detective Singleton contacted Sandra Garcia at juvenile hall. Garcia told him that on Monday, March 13, at about 7 p.m. she was at K-Mart buying paint; she saw the victim with Larry Montez. The victim asked her to go riding with them, but she declined and they left in a white station wagon with two males and two females. Ms. Garcia stated she left K-Mart and went to California Park and sniffed paint and smoked angel dust. The vehicle passed again with the same occupants, and she again declined the victim's offer to go riding. Garcia decided to go to her stepmother's near Union Cemetery. At about 8 or 8:30, as she walked through the cemetery, she saw two females fighting near a vehicle and heard a moan as one fell to the ground. She then saw people get into the car and drive past her and noticed Larry Montez was still driving the vehicle. Detective Singleton took Garcia to the scene where she pointed out the area in which the fight occurred. It was approximately where the body was found.

Detective Singleton subsequently recontacted Garcia, who then indicated that her prior story regarding seeing the victim with Larry Montez was not true. She refused to tell him who was with the victim.

At trial Sandra Garcia testified that she saw the victim at K-Mart at 7:30 on Monday night with a Mexican man but not appellant. She left K-Mart and went to California Park and saw the victim in the same car. Garcia then went to the cemetery. She said there was enough light for her to see two girls arguing and fighting. One of the females fell. The others got in a car and ran over the

body. Ms. Garcia testified that the car was the same one she saw at K-Mart and that the male accompanying the victim looked like Larry Montez. She said that when questioned by Detective Singleton he told her she was lying and appellant was involved, and she refused to talk further as she felt it was futile.

Lillian Ortiz, Frank G. and appellant were arrested for the offense on April 12. Appellant was questioned and denied knowing the victim and denied involvement in the killing. Frank G.'s car was seized and identified by Balderas as the car which was driven on the night of the murder.

Detective Singleton testified at trial that no curb feeler had been found on Frank's car, nor was there any evidence that one had been there.

Detective Singleton also indicated that a lime green, mid-sixties, "low-rider" vehicle with "rocket-type mags" had been suspected and that rubber molding with lime green paint on it had been found at the scene several days after the body had been found.

The defense consisted of alibi testimony and testimony tending to impeach and discredit the prosecution's principal witness, Balderas.

In addition to the testimony of Sandra Garcia regarding the victim's being with Larry Montez just before the murder, appellant called his mother, Veronica G., who testified that she knew appellant was at home all day Sunday because he was there when she left for work and when she called home during the early evening. On Monday, March 13 (the day of the murder), appellant

visited the Acostas twice, one at 11:30 a.m. and again around 2 p.m. At about 4 p.m. appellant went with his mother, brother and sister-in-law to look at cars for his brother. He returned with his family and spent the evening of Monday, March 13, at home. On Tuesday, March 14, his mother gave him a check to buy a concert ticket. Veronica testified that the only belt appellant owned was a beige Boy Scout belt.

Margie Acosta confirmed Veronica's testimony as to visits made by appellant to her home. She also testified that the belt involved in the murder was not appellant's.

Rachel Ortiz testified that she saw appellant's brother, Frank G., whom Balderas testified was present when the murder occurred, Saturday, and they went to Sammy Garcia's and spent the night. They went riding and then returned to Sammy's. Sunday night they went to the El Morocco Motel and spent the night. On Monday, March 13, they went to see Frances Gonzales and then went to Sammy's. On Monday night, Frances and a man named Raymond stayed with Frank and Ms. Ortiz at the motel.

David Maceas, Lillian's boyfriend, testified that he had been with her on Monday because he remembered taking her to the cleaner's on Tuesday and seeing police cars at the cemetery.

Frank G. testified that he registered at the El Morocco Motel on Sunday as John Lopes. A motel registration corroborating his testimony was introduced into evidence.

Arg Rogers testified that she saw the victim on Sunday, March 12, at 11 at her home. She testified that the

victim was at her house again on Monday at 12 and left with a guy in a truck. She saw the victim later with another man in a truck. The victim returned at about 2 or 3 p.m. She left at 6 p.m.

Mary Ann Ramos, Mrs. Rogers' granddaughter, testified that she last saw the victim on Monday at 6:15 p.m. She had borrowed a black belt from Ms. Ramos.

Dr. Dominick Ambrosecchia of the coroner's office testified that the cause of death was asphyxiation due to a belt tied around her neck and multiple traumatic injuries. Contrary to Ms. Balderas, Ambrosecchia also testified that the belt could not have been turned from back to front as it was so tight that doing so would have caused abrasions. He saw no evidence that blood had flowed from the victim's nose. He also testified that the marks on the victim's back were not consistent with the car running over her. He thought it was unlikely that the victim's body could have been flipped over by running over it with a car.

Frank Dobesh, Superintendent of Union Cemetery, testified that there are no lights in the cemetery and the closest lights are street lights located about 100 yards outside the cemetery.

Frances Devora testified that the victim and Lillian Ortiz were on extremely bad terms and that she would be very surprised to see them together. In contradiction to Balderas' testimony, Ms. Devora also testified that Frank G. and appellant did not attend services for the victim and that it was Frances' sister, Victoria, who placed a black rose on the coffin. Victoria Devora con-

firmed this testimony.

When confronted with prior inconsistent statements, Balderas repeatedly did not recall making them or admitted she had made them up. Balderas did not remember having said that "they ran over her first and then strangled her." She denied saying that "[t]hey wanted to rape her after she was dead but they didn't have the guts to." She also stated she lied when she said that she heard Lillian Ortiz say she finished the victim off.

Ms. Balderas testified that before the killing she took a friend who wanted to buy angel dust to meet "Fat Eddie," Frank G. and appellant. Fat Eddie, Frank G. and appellant took the money without giving them any drugs and left for good. Ms. Balderas called her brother and got some grenades and guns together to go after them.

Balderas also testified that she had had a fight with Liz Moore in which she had stabbed her, and a fight with Lillian during which she shot her twice because Lillian had been going out with her boyfriend.

Balderas testified that there were two pole lights at the cemetery. She stated that she lied when she told the police that a "black guy" killed the victim; that appellant was driving; and that everyone had sex with everyone else that night. She also testified that she remembered telling police that blood was coming from the victim's nose but didn't remember if this was true.

By way of rebuttal respondent presented evidence that after appellant had been arrested he and his mother were placed in a room in the Bakersfield Police Department which was equipped with a monitoring device. During the conversation between appellant and his mother, his mother said that they would find out who started all the trouble for appellant and that the person would pay for it. She also said that, "I am going to find out what date they say this girl is supposed to have been killed. That way I can go back and remember, remember where you were. [¶]I know you were home."

DISCUSSION

Preliminarily we note that most of appellant's brief consists of a scholarly discourse on the constitutionality of depriving appellant of a jury trial and of the substantial evidence rule as he perceives it.

Adverting first to the jury trial discourse, it is settled as of now that ". . . neither the state nor the federal Constitution guarantees a jury trial in a juvenile proceeding." (*People* v. *Superior Court (Carl W.)* (1975) 15 Cal.3d 271, 274; *In re Roger S.* (1977) 19 Cal.3d 921, 938; *Richard M.* v. *Superior Court* (1971) 4 Cal.3d 370, 376; *In re Daedler* (1924) 194 Cal. 320, 332; *McKeiver* v. *Pennsylvania* (1971) 403 U.S. 528, 545.) We are bound by these decisions. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Turning next to the substantial evidence rule, it is undoubtedly true that there have been some misquotations and misapplication of the rule as well as distortions of it by the quotation of selected parts to fit the factual situations in particular cases. Nevertheless, the true scope and import of the rule has been made clear by

leading Supreme Court decisions. Because considerable argument has been devoted to the subject by the parties, it is necessary to quote at some length from leading California cases on the subject before proceeding to a consideration of whether the California standard of review has been changed by the recent United States Supreme Court case of *Jackson* v. *Virginia* (1979) _____ U.S. _____ [99 S.Ct. 2781].

The leading case in this area is *People* v. *Redmond* (1969) 71 Cal.2d 745, 755–756, which instructs:

> "This court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.]
>
> "Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.] Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. [Citations.]
>
> "In *People* v. *Bassett,* 69 Cal.2d 122, 139 [70 Cal.Rptr. 193, 443 P.2d 777], we recently pointed out that, in considering the sufficiency of evidence purporting to connect the defendant with the crime, '*the appellate court is required to determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt* [citations]. The prosecution's burden is a heavy one: "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." [Citation.] Accordingly, in determining whether the record is sufficient in this respect the appellate court can give credit only to "substantial" evidence, i.e., evidence that reasonably inspires confidence and is "of solid value." ' As *Bassett* points out, this rule has also been applied in numerous cases involving the sufficiency of evidence as to matters other than identification. [Citation.]" (Emphasis added.)

Redmond has been cited and all or parts of its language has been repeated in substance in numerous subsequent cases. (See *People* v. *Reyes* (1974) 12 Cal.3d 486, 496–497; *People* v. *Vann* (1974) 12 Cal.3d 220, 225; *People* v. *Culver* (1973) 10 Cal.3d 542, 548; *People* v. *Kunkin* (1973 9 Cal.3d 245, 250; *In re Roderick P.* (1972) 7 Cal.3d 801, 808–809; *People* v. *Reilly* (1970) 3 Cal.3d 421, 425.)

Reyes and *Kunkin* require particular note. In *Reyes* the court equated the substantial evidence rule with the standard of " 'a reasonable trier of fact' " determining whether the " '. . . prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.' " The court stated:

"There is merit to Venegas' contention that the evidence adduced at trial is insufficient to support the judgment rendered against him. In reviewing a criminal conviction, an 'appellate court *must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.*' [Citations.] The substantial evidence rule is our yardstick for determining whether a verdict meets this minimal standard of reasonableness: 'The test on appeal becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.' [Citations.] To be considered substantial, evidence must be of the type which 'reasonably inspires confidence and is "of solid value." ' [Citation.]" (*People* v. *Reyes, supra,* 12 Cal.3d at pp. 496–497.) (Emphasis added.)

In *Kunkin,* after reciting the substance of the rule, the court states:

"The substantial evidence rule mandates consideration of the weight of the evidence before deferring to the conclusions drawn from the evidence by the trier of fact." (*People* v. *Kunkin, supra,* 9 Cal.3d at p. 250.)

Implicit in the appellate court's duty to consider the weight of the evidence and to determine "'. . . whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt'" (*People* v. *Reyes, supra,* 12 Cal.3d at p. 496) is the obligation to review the whole record. In no other way can the court determine whether evidence merely raises a suspicion

of defendant's guilt or reasonably inspires confidence and is of solid value. If the court did not review the whole record it would be faithless to its duty under the rule. Accordingly, appellant's contentions that the substantial evidence rule in California does not require the appellate court to look at the whole record and that its duty is satisfied upon the discovery of *any evidence* to support the verdict are without merit.

In *In re Roderick P., supra,* 7 Cal.3d 801, 808–809, the substantial evidence rule as articulated in *Redmond, supra,* was held applicable to juvenile court proceedings.

It remains to determine whether under *Jackson* v. *Virginia, supra,* _____ U.S. _____ [99 S.Ct. 2781] a more stringent standard is required by the United States Constitution.[1] *Jackson* was a federal habeas corpus proceeding in which the federal Court of Appeal had applied the "no-evidence" criteria of *Thompson* v. *Louisville* (1960) 362 U.S. 199 to a state conviction of murder and denied the writ. In *Thompson* v. *Louisville, supra,* the court held that the writ should be denied if there was *any* evidence to support a state court conviction.

The *Jackson* court held that as a matter of due process the standard for evaluating the sufficiency of evidence is whether any rational trier of fact could find guilt beyond a reasonable doubt, stating:

"But this inquiry does not require a court to 'ask itself whether *it* believes that the evidence a the trial established guilt beyond a reasonable doubt.' *Woodby* v. *INS,* 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362. Instead the relevant question is whether, after

[1] The respondent concedes that the standard of *Jackson* is binding on the California courts.

viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson* v. *Louisiana,* 406 U.S. 356, 362, 92 S.Ct. 1620, 33 L.Ed.2d 152. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." [13] (*Jackson* v. *Virginia, supra,* _____ U.S. _____ [99 S.Ct. at pp. 2789–2790]; fn. 12 omitted.)

In footnote 13 the court further elaborates:

> "The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known. See generally 3 Wharton's Criminal Procedure § 520 (1975 and Supp. 1978)." (99 S.Ct. at p. 2790.)

The language in *Jackson* is so close to that used in *Redmond* and subsequent cases as to be indistinguishable in impact or application. The only semantic difference is that the United States Supreme Court in *Jackson* used the work "rational" in its formulation, whereas the California Supreme Court has used the word "reasonable." The words are synonymous. (Webster's New World Dict. (2d College ed. 1972) pp. 1179, 1183.) Accordingly, we hold the California substantial evidence test has not been changed by *Jackson* and that it comports with due process of law.

Applying the foregoing test to the facts of the instant case, we are impelled to conclude that upon examination of the whole record the evidence was sufficient to support the juvenile judge's determination that appellant violated Penal Code section 187 and in concluding it was murder in the second degree (Pen. Code, § 189).

Balderas' sworn statements at trial amount to eyewitness testimony that appellant committed the offense at hand. The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. (Evid. Code, § 411;[2] *People* v. *Robinson* (1964) 61 Cal.2d 373, 389; *People* v. *Matlock* (1959) 51 Cal.2d 682, 695; *People* v. *Maxwell* (1979) 94 Cal.App.3d 562, 574–577.)

While Balderas admits she did not actually see appellant knot the belt around the victim's neck she did observe appellant to lasso the victim around the neck with a belt. She observed them struggling and the victim falling to her knees. Balderas was in back of appellant while he and the victim struggled when the victim attempted to get the belt off from around her neck. She

[2] Evidence Code section 411 provides:
"Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

observed the victim fall to the ground and cease struggling. Appellant stood up and said, "like he was crying," "Oh, my God, I've killed her." Balderas saw that the belt had been tied around the victim's neck and knotted in the back. Balderas did not observe anyone else in a position to have been able to contribute to the strangulation of the victim. Moreover, his oversensitive sexual macho had been sullied by the victim's stinging remarks in the presence of the others regarding his inability to have sexual intercourse. Sandra Garcia corroborated that there was sufficient light to see and that the car subsequently ran over the victim's body and at one point two women were fighting. The testimony of Balderas constitutes substantial evidence to support appellant's conviction.

The thrust of appellant's argument, both below and in this court, is directed toward discrediting the testimony of Balderas. Appellant urges that as a matter of law it does not reasonably inspire confidence and is not of solid value. In doing so he impliedly implores this court to independently determine from the whole record whether the evidence was sufficient to conclude that appellant is guilty beyond a reasonable doubt. As heretofore explained, this goes beyond our duty, it being limited to determining whether there is sufficient evidence upon which a reasonable trier of fact could have found the prosecution sustained its burden of proving defendant guilty beyond a reasonable doubt. It is not our function to reweigh the evidence, reappraise the credibility of witnesses or redetermine factual conflicts, those functions being within the province of the trier of fact. (*People* v. *Culver* (1973) 10 Cal.3d 542, 548; *People* v. *DePaula* (1954) 43 Cal.2d 643, 649; *People* v. *Huston* (1943) 21 Cal.2d 690, 693 (disapproved on other grounds in *People* v. *Burton* (1961) 55 Cal.2d 328, 352).) The limitation in this regard is that the appellate court will not uphold a verdict based upon evidence which is inherently improbable and thus may reject evidence believed by the trier of fact if there exists either a physical impossibility that it is true or the falsity of the evidence is apparent without, resorting to inference or deduction. (*People* v. *Mayberry* (1975) 15 Cal.3d 143, 150; *People* v. *Huston, supra,* 21 Cal.2d 690, 693.) There is nothing in this record rendering Balderas' version inherently improbable, physically impossible or legally unbelievable.

Appellant argues that her testimony could not be considered substantial evidence because: (1) she was an accomplice whose testimony must be viewed with distrust; (2) because of the promise of immunity she had an interest in testifying against appellant; (3) at the time of the events she observed she was under the influence of drugs; and (4) the contradictions inherent in her testimony and between her testimony and other evidence in the case makes her entire testimony unbelievable.

The rule requiring corroboration of an accomplice's testimony (see Pen. Code, § 1111) is not applicable in a juvenile court proceeding. (*In re Mitchell P.* (1978) 22 Cal.3d 946.) Moreover, Balderas was not technically an accomplice in this case. An accomplice is one "who is liable to prosecution for the identical offense charged

against the defendant. . . ." (Pen. Code, § 1111.) There is no evidence to suggest that Balderas aided appellant in the commission of the offense.

Contrary to appellant's statement, Balderas did not testify under a promise of immunity from prosecution for the crime but during trial was given immunity with respect to her testimony regarding her use of drugs. Whatever bias she had as a result of favors she was offered in return for her testimony of her own personal interest in the outcome, like her use of drugs before the murder, merely goes to her credibility and does not render her testimony unbelievable as a matter of law.

Lastly, appellant points to numerous contradictions of and internal inconsistencies in her testimony. The principal conflicts are: Sandra Garcia testified that she only saw two women arguing and fighting. Also contrary to Balderas' testimony, appellant's mother testified that she was with appellant on the night of the murder. Rachel Ortiz and Frank G. both testified that Frank G., whom Balderas testified was at the cemetery when the victim was killed, was elsewhere on the evening of the murder. David Macias testified that Lillian was with him Monday.

The testimony of the pathologist was inconsistent with some parts of Balderas' testimony. Balderas testified that they ran over the victim's body with the car. The pathologist testified that marks on the victim's body were not consistent with having been run over by a vehicle. However, this aspect of appellant's testimony was confirmed by Ms. Garcia, who testified that whoever did the

killing ran over the body. Balderas also testified that as a result of running over the body it was turned. The pathologist testified that running over a body was unlikely to result in its turning. Balderas further testified that she went back after the incident and twisted the belt around. The pathologist testified that such an action would have caused abrasions which were not present on the body. Balderas testified that she observed blood come from the victim's nose. An expert testified that no trauma to the nose was observed during the autopsy.

Balderas testified that the victim used heroin on the morning of the murder. An expert testified that it was unlikely that such narcotics could be flushed from the bloodstream in only eight hours. However, the victim's mother testified that she last saw the victim at 6 o'clock that evening. That was well over the eight-hour period covered by the stipulation. Therefore, this does not constitute an actual contradiction. Balderas testified that appellant used his belt to strangle the victim. Margie Acosta testified the belt used to strangle the victim was not appellant's. Balderas testified that there were pole lights in the cemetery. In fact, no such lights existed. Nevertheless, there were lights 100 yards away, which were sufficient for Sandra Garcia to be able to see what occurred from a distance.

Lastly Balderas admitted that she gave prior false statements to police as to what happened on the night of the murder.

The above contradictions relate primarily to events which occurred either before or after the actual murder.

They are independent of and separable from the version of events testified to by Balderas which constituted the substantial eyewitness testimony against appellant. Those contradictions do not render her testimony impossible or unbelievable but only create a conflict in the testimony and go to Balderas' credibility, which is for the trial court to evaluate. The version given by Balderas is not inherently improbable or impossible, and the court's determination to accept it is sustainable on appeal.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

BROWN, (Geo A.)

P.J.

WE CONCUR:

FRANSON

J.

ZENOVITCH

J.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102
October 18, 1979

I have this day filed Order _____

_____

_____

_____

_____ HEARING DENIED _____

_____

_____

_____

In re: 5 Civ. No. 4311 In re Frederick Joseph G., A Person Coming Under the Juvenile Court Law; People v. Frederick Joseph G.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX C

Court of Appeal
of the State of California
In and for
the Fifth Appellate District
5 Civil No. 4311

In re FREDERICK JOSEPH G., a minor
THE PEOPLE,
Plaintiff and Respondent,
vs.
FREDERICK JOSEPH G.,
Defendant and Appellant.

SUPERIOR COURT
NO. 44425
REMITTITUR
ON APPEAL
FROM THE
SUPERIOR COURT
IN
AND FOR
THE COUNTY OF
KERN 44425

The above-entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the judgment of the Superior Court in and for the County of Kern in the above-entitled cause, be and the same is hereby affirmed.*

I, KEVIN A. SWANSON, Clerk of the Court of Appeal of the State of California in and for the Fifth Appellate District, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 24th day of August, 1979, and now remaining of record in my office.

WITNESS *my hand and the seal of the Court, affixed at my office, this 24th day of October, A.D., 1979.*

KEVIN A. SWANSON,

Clerk

By R. Brown

Deputy

Judgment Recorded: June 26, 1978, Book 204, Page 433.

Supreme Court, U. S.
FILED
APR 4 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-989

FREDERICK JOSEPH G.,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court
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OCTOBER TERM, 1979

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FREDERICK JOSEPH G.,
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THE PEOPLE OF THE STATE OF CALIFORNIA,
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On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeal affirming petitioner's conviction before a juvenile court upon a charge of murder was filed on August 24, 1979, and is reported at 96 Cal. App.3d 353, 157 Cal.Rptr. 769. The opinion is reproduced as Appendix "A". A timely petition for discretionary review was thereafter filed in the California Supreme Court on September 27, 1979. That court filed an order denying review on October 18, 1979, and the judgment of the Court of Appeal became final on October 24, 1979. (Cal. Rules of Court, rules 25, 28.)

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Does California's standard for appellate review of the sufficiency of evidence supporting a juvenile court conviction violate due process of law?

Is there sufficient substantial evidence supporting the judgment of the juvenile court in the instant case?

Do substantial and compelling reasons remain for not extending the right to jury trials to juveniles?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth Amendment and Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On April 14, 1978, a supplemental petition numbered 544,425 was filed in the Kern County Juvenile Court by the district attorney alleging that petitioner Frederick Joseph Grijalva was a person coming within the provisions of California Welfare and Institutions Code section 602 in that petitioner had allegedly violated Penal Code section 187 (murder) (CT 2).[1]

On April 17, 1978, petitioner appeared with retained counsel and denied the jurisdictional allegations (CT 3).

[1] "CT" refers to the Clerk's Transcript on Appeal to the Court of Appeal of the State of California, Fifth Appellate District, in case number 5 Civil 4311. If the Court so desires, respondent will furnish said transcript upon request.

The matter was continued to May 10, 1978, for a jurisdictional hearing (CT 4).

On May 8, 1978, petitioner requested a continuance and on May 10, 1978, the matter was continued until May 15, 1978 (CT 12).

On May 25, 1978, a discovery order was filed directing the district attorney and various law enforcement agencies to allow petitioner discovery of material in his possession or under his control (CT 17-19).

Petitioner appeared with counsel on June 20, 1978, for commencement of the jurisdictional hearing (CT 25).

On June 26, 1978, the court found the jurisdictional allegations of the supplemental petition to be true in that petitioner had violated California Penal Code section 187 and determined the murder to have been committed in the second degree. The matter was continued until July 10, 1978, for a dispositional hearing (CT 36-37).

The probation report was filed on July 7, 1978 (CT 38-45).

Only July 10, 1978, the court denied petitioner's motion for a new trial and then ordered petitioner committed to the California Youth Authority for seven years or until his 23d birthday (CT 46).

On August 16, 1978, petitioner filed timely notice of appeal (CT 49).

STATEMENT OF FACTS

On the afternoon of Sunday, March 12, 1978, 19-year-old Liz Moore, Lillian Ortiz and 21-year-old Connie Balderas

were at the Balderas home at 1105 Lincoln in Bakersfield, California, along with three men, Frank Grijalva; his 16-year-old brother, petitioner Joe Grijalva; and another boy named Chris (RT 48-49).[2]

The people were using heroin, marijuana and angel dust (RT 50).

Later that evening Chris left and another man, Pete Ramirez, joined the group and they all went out riding around (RT 50, 70). After riding around they went to a couple of bars in Bakersfield (RT 50). The group was not able to get into the bars because some of the people were not old enough (RT 72). After trying to get into the bars, the group went to Bakersfield's Union Cemetery and "partied around" for awhile and then returned to Connie Balderas' house (RT 73). Liz Moore, Lillian Ortiz, Frank Grijalva, Pete Ramirez and petitioner stayed the night at Connie's house (RT 51).

The next morning Connie went to work at Stan's Car Wash in Bakersfield (RT 50-51). Before going to work, Connie and Liz Moore shot up with heroin (RT 52). Connie worked at the car wash until about 5 p.m. on Monday (RT 51).

After coming home from work, Connie Balderas met Liz Moore at a house across the street from Connie's (RT 52). Liz had bought some heroin at the house (RT 81). Liz and Connie went back to Connie's house where Connie shot up

[2]"RT" refers to the Reporter's Transcript on Appeal to the Court of Appeal of the State of California, Fifth Appellate District in case number 5 Civil 4311. If the Court so desires, respondent will furnish said transcript upon request.

with the heroin. Although Liz was with her, Connie did not see Liz use heroin (RT 52).[3]

From Connie's house, Liz and Connie started out toward California Park (RT 55, 82). On the way, Connie and Liz met petitioner, his brother Frank, and Lillian on the Beale Street Overpass (RT 55). They were in a bluish white 1958 Chevrolet which Frank was driving (RT 55).

Liz and Connie got into the car and went with the people to the K-Mart and Liquor Store across the street from the park (RT 56). Liz and Connie went into the store and stole some paint (RT 84).

Sandra Garcia, who was a friend of Liz Moore's, saw her at K-Mart with a young Mexican man who did not look like petitioner at about 7 or 7:30 p.m. on Monday, March 13 (RT 161-162). Liz Moore asked Sandra if she wanted to go cruising with them (RT 164). Sandra Garcia had this conversation with Liz Moore near the paint cans in the K-Mart Store (RT 169).

Sandra Garcia saw Liz Moore leave the K-Mart Store in a station wagon (RT 164). Sandra Garcia then left the K-Mart Store and went to the California Avenue Park (RT 164).

[3]During the jurisdictional hearing it was stipulated that the blood sample taken from Liz Moore at the autopsy contained no noticeable traces of narcotics (RT 404).

There was also an attempted stipulation that the pathologist would testify that given a certain amount and quality of heroin it is possible, although not improbable that the blood could flush itself of heroin within eight hours and that it usually takes forty-eight hours. However, the latter portion of the proposed stipulation was not agreed to by the prosecuting attorney (RT 404).

Sandra Garcia saw Liz Moore at the park on Monday night (RT 164). Later Sandra Garcia left the park and started walking to her stepmother's house (RT 28). On the way Sandra Garcia walked by the Union Cemetery (RT 165). When Sandra got to the cemetery it was dark (RT 165).

After leaving the K-Mart Store, Connie Balderas recalled that the group drove out to the Union Cemetery to have a party (RT 56). While they were at the cemetery, Frank and Lillian had sexual intercourse in the car. Meanwhile Liz and petitioner went off by themselves for about 20 minutes (RT 56). When they returned Liz said, "Joe was a cherry because he didn't do anything" (RT 56). Petitioner told her to shut up and seemed kind of embarrassed by the remark about his sexual prowess (RT 57).

Liz, petitioner and Connie then laid down together in the grass (RT 57). The girls were kidding petitioner about why he could not have sex with Liz (RT 57). At this point, Liz Moore and Lillian Ortiz got into a fight over Connie's boyfriend. The fight started when Liz began kidding with Lillian that she had had sexual intercourse with Connie's boyfriend (RT 58).

Liz took off her belt and hit Lillian with it (RT 58). Lillian then asked petitioner for his belt and he gave it to her (RT 59). The two women began fighting with the belts (RT 59). Connie got between Liz and Lillian and asked them to stop fighting (RT 59). Liz tried to get away from the fight by running. Petitioner, however, began running after Liz cussing at her (RT 60). Petitioner said he was

going "to show this bitch how to run" (RT 60). Petitioner lassoed Liz around the neck with the belt he had taken off and given to Lillian (RT 60). Liz fell to her knees and fought with petitioner to get the belt off her neck (RT 60).

Connie pulled at petitioner's hair and tried to pull him away from Liz (RT 61). Meanwhile, Lillian kicked Liz Moore in the cheek (RT 61). Liz then fell to the ground on her stomach and stopped fighting (RT 61). The belt was around her neck with a knot tied in the back (RT 61).

Connie never saw Lillian in a position to have knotted the belt around Liz Moore's neck (RT 62).

After Liz had fallen to the ground, petitioner said, "Oh my God, I've killed her" (RT 61-62).

Meanwhile, Sandra Garcia, who was passing by the cemetery, heard people arguing (RT 166). Sandra Garcia said it "sounded like two girls" arguing (RT 167).

In spite of the darkness, there was enough light for Sandra Garcia to see two people fighting and she could see arms swinging (RT 167). She also saw "some" of the people who were fighting fall to the ground (RT 167).

After the killing, everyone then ran to the car and took off (RT 62). In leaving the cemetery, the car drove over Liz Moore's body (RT 62-63). Sandra Garcia also saw the car drive over the body (RT 167). Connie looked back after the car drove over the body and saw that it had been moved and was now lying on its side (RT 63).

Connie Balderas got out of the car on Beale Street and went back to the cemetery to try and help Liz Moore (RT

63). Connie said she twisted the belt around Liz's neck until the knot was in the front trying to loosen it (RT 63). Connie also picked up Liz's blouse but could not detect any signs of breathing (RT 64).

On March 14, 1978, at about 8 a.m., Detective Bradley Singleton of the Bakersfield Police Department was called to the Union Cemetery in Bakersfield to investigate the murder of Liz Moore (RT 18). He found the victim lying on her back in a spread-eagle position in a crossroads (RT 19). She had on Levi's which were buttoned but unzipped (RT 19). There was blood on her head and the pavement below; a laceration on her left ear; and an abrasion on the left cheek (RT 20). There was also a laceration on the right side of her head above the ear (RT 22). A black and brown elastic belt was tied around her neck (RT 22). There were also abrasions on her back (RT 23). There were fresh needle marks on the victim's arms, the ring on her left hand had been smashed, and there was an abrasion on her right hand (RT 24, 39). A curb feeler was found next to the victim's body (RT 25).

The cause of death was asphyxiation from the belt tied around Liz Moore's neck and multiple traumatic injuries (RT 192).

A day or two after the killing Connie Balderas called the police (RT 67). Detective Singleton interviewed Connie Balderas on March 15, 1978 (RT 25). Because she was scared, Connie did not tell the police everything she knew during this interview (RT 67). Thus, Connie told him that the victim had come to the Balderas house to borrow money

for a "fix," and that Ms. Balderas believed that Lillian Ortiz was responsible for the murder (RT 26).

Detective Singleton also contacted Sandra Garcia at juvenile hall (RT 26). Ms. Garcia stated that on March 13 at about 7 p.m. she was at K-Mart buying paint and that she saw the victim with Larry Montez (RT 27). Liz Moore asked her to go riding with them but she declined and they left in a white station wagon with two males and two females (RT 27-28). Ms. Garcia told Singleton that she left K-Mart and went to California Park and sniffed paint and smoked angel dust (RT 28). The vehicle passed again with the same occupants and she again declined the victim's offer to go riding with them (RT 28). Ms. Garcia decided to go to her stepmother's house which is near Union Cemetery (RT 28). At about 8 or 8:30 she went through the cemetery, saw two females fighting near a vehicle and heard a moan as one fell to the ground (RT 29). She then saw people get into the car and drive past her and noticed Larry Montez was still driving the vehicle (RT 27). Detective Singleton took Ms. Garcia to the scene where she pointed out the area in which the fight occurred (RT 30). It was approximately where the body was found.

Several days after the murder, petitioner, his brother Frank and a person called Fat Eddie came to Connie Balderas' house (RT 66). They wanted to clean up the Chevrolet at Connie's house but she would not let them ((RT 66).

Several days later Lillian, Frank and petitioner again came to Connie's house and this time they said that if they ever got caught, they were to say they were in different directions and that they did not know each other (RT

67). After petitioner, Frank and Lillian came to her house, Connie again called the police, but again lied to them because she was afraid (RT 67-68).

Detective Singleton subsequently recontacted Ms. Garcia, who then indicated that portions of her prior story were not true (RT 30). In her second interview, Sandra Garcia told Detective Singleton that her earlier statements about seeing Larry Montez with Liz Moore and seeing him driving the car were a lie (RT 30).

Connie Balderas was interviewed again by Detective Singleton on April 11, 1978, and this time Connie told the police that Liz Moore had "burned" some people over a quantity of heroin and that several days before the murder, petitioner and his brother had been at Connie's house and had said they would get Connie for that (RT 96).

Petitioner was arrested on April 12, 1978 (RT 35). Following his arrest and after being advised of his rights, Detective Singleton asked petitioner whether he knew Liz Moore and petitioner denied knowing her (RT 36).

On April 12, 1978, the police found the 1958 Chevrolet at petitioner's Uncle's residence in Bakersfield (RT 36-37). The car did not have a curb feeler on it when the police located it (RT 37).

Connie Balderas was again interviewed by Detective Singleton because he felt she knew something she was not telling the police (RT 231).

In her later interviews, including a session involving hypnosis, Connie Balderas gave the police a complete statement which agreed with the physical facts of the crime

(RT 30, 231). Because she feared for her safety if she testified against petitioner, Detective Singleton told Connie the police would send her out of town and help her relocate somewhere after the case was completed (RT 38). The police also told Connie they would try to help her boyfriend, who was incarcerated, with his case (RT 43).

DEFENSE

Petitioner's defense consisted almost entirely of an attempt to discredit and impeach the testimony of Connie Balderas.

The pathologist testified that there was no evidence of blood coming from the victim's nose although Connie had said she saw blood coming from the victim's nose (RT 202). Dr. Ambrosecchia also testified that it was unlikely in his opinion that the car had run over the body and flipped it on its side (RT 206). Finally, Dr. Ambrosecchia testified that he felt it was unlikely that the belt had been turned around on the victim's neck because it was too tight and because there were no abrasions on the neck which would have been left there if the belt had been twisted (RT 197).

Frank Dobesh, the Cemetery Superintendent, testified that there were no lights in the cemetery and that the closest lights are street lights which are located about 100 yards outside the cemetery grounds (RT 226-227). Connie testified that there was adequate light in the cemetery to see and that there were lights in the cemetery (RT 139).

In contradiction to Connie's testimony, Ms. Devora testified that Frank and petitioner did not attend funeral serv-

ices for the victim and that it was Frances' sister, Victoria, who placed a black rose on the victim's coffin (RT 249-251). Victoria Devora confirmed this testimony (RT 257-261).

Petitioner's mother, Veronica Grijalva, testified that she knew petitioner was at home all day Sunday because he was there when she left for work and when she called home during the early evening (RT 267, 268). Petitioner's mother also testified that on Monday, petitioner visited the Acostas twice, once at 11:30 a.m. and again around 2 p.m. (RT 270). She said that at about 4 p.m., petitioner went with his mother, brother and sister-in-law to look at cars for his brother (RT 271). According to his mother, petitioner returned with his family and spent Monday evening at home (RT 272-273). On Tuesday, his mother gave him a check to buy a concert ticket (RT 274-275). Mrs. Grijalva testified that the only belt petitioner owned was a beige Boy Scout belt (RT 278).

Margie Acosta confirmed Mrs. Grijalva's testimony as to visits made by petitioner to her home (RT 313-315). She also testified that the belt involved in the murder was not petitioner's (RT 323-324).

Rachel Ortiz testified that she saw Frank on Saturday and that they went to Sammy Garcia's and spent the night (RT 329). They went riding and then returned to Sammy's (RT 330). Sunday night they went to the El Morocco Motel and spent the night (RT 330). On Monday they went to see Frances Gonzales and then went to Sammy's (RT 332). On Monday night Frances and a man named Raymond stayed with Frank and Ms. Ortiz at the motel (RT 343).

David Maceas, Lillian's boyfriend, testified that he had been with her on Monday because he remembered taking her to the cleaner's on Tuesday and seeing police cars at the cemetery (RT 351).

Frank Grijalva testified that he registered at the El Morocco Motel on Sunday as John Lopez (RT 364). A motel registration corroborating his testimony was introduced into evidence (RT 365).

Arg Rogers testified that she saw the victim on Sunday at 11 a.m. at her home (RT 380). She testified that the victim was at her house again on Monday at 12 p.m. and left with a guy in a truck (RT 382). She saw the victim later with another man in a truck (RT 382). She ate some meat with corn in it and left at 6 p.m. (RT 382).

Mary Anne Ramos, Mrs. Rogers' granddaughter, said she saw the victim at El Montecito on Saturday night and they stayed at Ms. Ramos' house that night and all day Sunday and Sunday night (RT 388-389). On Sunday night they went to La Copa and Ms. Ramos said she knew everyone there but does not know Ms. Balderas (RT 390). On Monday the victim ate meat and corn at 1 p.m. and again at 6:15 p.m. and left (RT 394). She had borrowed a black belt from Ms. Ramos (RT 395).

REBUTTAL

After petitioner had been arrested, he and his mother were placed in a room in the Bakersfield Police Department which was equipped with a monitoring device (RT 409).

During the conversation between petitioner and his mother, Mrs. Grijalva said that they would find out who

started all the trouble for petitioner and that the person would pay for it (RT 412).

Mrs. Grijalva also said that "I am going to find out what date they say this girl is supposed to have been killed. That way I can go back and remember, remember where you were. I know you were at home" (RT 414).

ARGUMENT

I

CALIFORNIA'S STANDARD FOR APPELLATE REVIEW OF THE SUFFICIENCY OF EVIDENCE SUPPORTING A JUVENILE COURT CONVICTION DOES NOT VIOLATE DUE PROCESS OF LAW

Petitioner insinuates that California's well-established and recently reviewed standard for testing the sufficiency of evidence supporting a juvenile court conviction violates the constitutional guarantee of due process of law. This contention has no merit.

While the term "due process of law" has been "the center of substantial legal debate over the years (see *In re Winship* (1970) 397 U.S. 358, 378 (J. Black, dissenting)), broadly interpreted, "due process of law" means fundamental fairness within our system of laws. (See e.g., *In re Winship, supra,* at 381; *Rochin v. California* (1952) 342 U.S. 165, 169). Due process of law protects an individual from arbitrary action of the government and action which shocks the conscience by failing to comport with traditional ideas of fair play and decency. (See e.g., *Meachum v. Fano* (1976) 427 U.S. 215, 226; *Breithaupt v. Abram* (1957) 352 U.S. 432, 435).

It is well settled that due process of law requires that, in the trial court, guilt of a criminal charge must be established by proof beyond a reasonable doubt. (*In re Winship, supra,* 397 U.S. at 361-365.)

However, once the trier of fact has made its determination of guilt beyond a reasonable doubt, due proces of law does *not* require the reviewing court to impose its own interpretation of what evidence constitutes guilt beyond a reasonable doubt. To the contrary, it is well settled that to render a criminal conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment, the conviction must be "totally devoid of evidentiary support." (*Garner v. Louisiana* (1961) 368 U.S. 157, 163.)

Recently this Court held that "as a matter of due process the standard for evaluating the sufficiency of evidence is whether any rational trier of fact could find guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) ..... U.S. ..... 99 S.Ct. 2781.) However, the ruling in *Jackson* was not intended to transform an appeal into an unbridled *de novo* review of trial court proceedings. Thus, the Court of Appeal in its decision in the instant case correctly set forth the limitations to be placed upon an appellate court's review of the sufficiency of the evidence to support a juvenile court conviction:

> "But this inquiry does not require a court to 'ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt.' *Woodby v. INS,* 385 U.S. 276, 282 [17 L.Ed.2d 362, 87 S.Ct. 483, 486]. Instead the relevant question is whether, after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana,* 406 U.S. 356, 362 [33 L.Ed.2d 152, 92 S.Ct. 1620]. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." (*Jackson v. Virginia, supra,* ..... U.S. ..... [..... L.Ed.2d ..... at p. ....., 99 S.Ct. at pp. 2789-2790]; fn. 12 omitted.) 96 Cal.App.3d at 365.

Such a rule for appellate review of the sufficiency of evidence supporting a judgment is mandated by the basic element of our system of criminal and juvenile justice—the determination of the guilt or innocence of a person accused of a criminal offense is the *exclusive province* of the *trier of fact,* which is vested with the duty to assess the credibility of witnesses, determine factual conflicts, and render its determination beyond a reasonable doubt. (*Kotteakos v. United States,* 328 U.S. 750, 763-764 (1946); *Lloyd v. United States,* 226 F.2d 9, 13 (5th Cir. 1955); *Bridgman v. United States,* 183 F.2d 750, 756 (9th Cir. 1950)).

To ask, as suggested by petitioner, that the reviewing court interject its own personal interpretation of what constitutes guilt beyond a reasonable doubt would, in

essence, require the court to reweigh the evidence and redetermine guilt or innocence. Such a result would be contrary to the fundamental principle that "[i]t is not for [a reviewing] court to re-evaluate the evidence, or substitute [its] judgment for that of the [trier of fact]." (*Sandez v. United States,* 239 F.2d 239, 243 (9th Cir. 1956); see also *Kotteakos v. United States, supra,* 328 U.S. at 763; *United States v. Brown,* 335 F.2d 170, 172 (2nd Cir. 1964); *United States v. Randall,* 164 F.2d 284, 286-287 (7th Cir. 1947).

As noted by the Court of Appeal in its opinion, this Court's holding in *Jackson* did not announce a new rule of appellate review for California. In commenting on the history of California's substantial evidence rule the Court of Appeal correctly observed that:

> "It is undoubtedly true that there have been some misquotations and misapplication of the rule as well as distortions of it by the quotation of selected parts to fit the factual situations in particular cases. Nevertheless, the true scope and import of the rule has been made clear by leading [California] Supreme Court decisions." (96 Cal.App.3d at 362.)

In its opinion the Court of Appeal then proceeded to analyze the components of California's long standing substantial evidence rule. In so doing, the Court of Appeal cited an extensive passage from *People v. Redmond* (1969) 71 Cal.2d 745 which the Fifth District Court of Appeal characterized as the leading case in the area. Although extensive, the passage is worth repeating:

> "This court must view the evidence in a light most favorable to respondent and presume in support of

the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation]. If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.]

"Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.] Evidence which merely raised a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. [Citations.]

"In *People v. Bassett*, 69 Cal.2d 122, 139 [70 Cal. Rptr. 193, 443 P.2d 777], we recently pointed out that, in considering the sufficiency of evidence purporting to connect the defendant with the crime, 'the appellate court is required to determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt [citations]. The prosecution's burden is a heavy one: "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." [Citation.] Accordingly, in determining whether the record is sufficient in this respect the appellate court can give credit only to "substantial" evidence, i.e., evidence that reasonably inspires con-

fidence and is "of solid value." ' As *Bassett* points out, this rule has also been applied in numerous cases involving the sufficiency of evidence as to matters other than identification. [Citation.] *Redwood* has been cited and all or parts of its language has been repeated in substance in numerous subsequent cases. (See *People v. Reyes* (1974) 12 Cal.3d 486, 496-497 [116 Cal.Rptr. 217, 526 P.2d 225]; *People v. Vann* (1974) 12 Cal.3d 220, 225 [115 Cal.Rptr. 217, 526 P.2d 225]; *People v. Culver* (1973) 10 Cal.3d 542, 548 [111 Cal.Rptr. 183, 516 P.2d 887]; *People v. Kunkin* (1973) 9 Cal.3d 245, 250 [107 Cal.Rptr. 184, 507 P.2d 1392, 57 A.L.R.3d 1199]; *In re Roderick P.* (1972) 7 Cal.3d 801, 808-809 [103 Cal.Rptr. 425, 500 P.2d 1]; *People v. Reilly* (1970) 3 Cal.3d 421, 425 [90 Cal.Rptr. 417, 475 P.2d 649].)" (96 Cal.App.3d at 362-363.)

However, an appellate court will not uphold a verdict based upon evidence inherently improbable and thus may reject evidence believed by the trier of fact if there exists either a physical impossibility that it is true or the falsity of the evidence is apparent without resorting to inferences or deductions. (*People v. Mayberry* (1975) 15 Cal.3d 143, 150.) Simply stated, the test for reviewing the sufficiency of evidence "is whether there is substantial evidence to support the conclusion of the trier of fact." (*People v. Vann, supra,* 12 Cal.3d at 225; *People v. Culver, supra,* 10 Cal.3d at 548.) To be considered substantial evidence within the aforementioned test, the evidence "must be of the type which 'reasonably inspires confidence and is "of solid value." ' " (*People v. Reyes, supra,* 12 Cal.3d at 497.)

In applying this Court's holding in *Jackson* to California's substantial evidence rule, the Court of Appeal specifically held that:

> "Implicit in the appellate court's duty to consider the weight of the evidence and to determine '" . . . whether a reasonable trier of fact could have found the prosecution sustained of its burden of proving the defendant guilty beyond a reasonable doubt" ' (*People v. Reyes, supra,* 12 Cal.3d at p. 496) is the obligation to review the whole record. In no other way can the court determine whether evidence merely raises a suspicion of defendant's guilt or reasonably inspires confidence and is of solid value. If the court did not review the whole record it would be faithless to its duty under the rule. Accordingly, appellant's contentions that the substantial evidence rule in California does not require the appellate court to look at the whole record and that its duty is satisfied upon the discovery of any evidence to support the verdict are without merit." (96 Cal.App.3d at 364.)

California's substantial evidence rule as articulated in *Redmond, supra,* has been held applicable to juvenile court proceedings (*In re Roderick P., supra,* 7 Cal.3d 801, 808-809.)

In the recently decided case of *People v. Johnson* (1980) ..... Cal.3d ..... (Slip Op. filed February 29, 1980, in Crim. No. 20710) the California Supreme Court held that California's substantial evidence rule "complies with federal constitutional standards." (Slip Op. at p. 27.)

The California Supreme Court went on to explain the manner in which appellate courts must review the record on appeal:

> "The Court does not, however, limit its review to the evidence favorable to the respondent. As *People v. Bassett, supra,* 69 Cal.2d 122, explained, ' " our task is twofold. First, we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial;* it is not enough for the respondent simply to point to "some" evidence supporting the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts." ' (69 Cal.2d at p. 138.) (Fn. omitted.)" Slip Opinion, p. 20-30.)

As set forth above, Californias substantial evidence rule is comprised of fundamentally fair principles which safeguard a juvenile from suffering a conviction which is not supported by substantial evidence. Even the petitioner has noted the propriety of and necessity for California's standard for appellate review of the sufficiency of evidence supporting a criminal conviction. In his "Appellant's Opening Brief", filed on February 15, 1979, in the Court of Appeal of the State of California, Fifth Appellate District, petitioner stated,

> "The substantial evidence rule may well be justified in cases which are tried to a jury . . . The purpose of the jury is to serve as a buffer between the state and the individual whose life or liberty is at stake. If judges were empowered to overturn verdicts supported by substantial evidence because they merely disagreed with them, the jury would be converted into a mere fixture. Preservation of the jury's impartial role thus

requires something akin to the substantial evidence rule."

As interpreted in light of this Court's opinion in *Jackson,* it surely cannot be said that California's substantial evidence rule shocks the conscience or violates traditional rules of fair play and decency.

In fact, California's substantial evidence rule is remarkably similar to the federal rule enunciated by this Court as the *proper rule for appellate review of the sufficiency of evidence* supporting a criminal conviction. "It is not for [a federal appellate court] to weigh the evidence or to determine the credibility of witnesses." (*Glasser v. United States* (1942) 315 U.S. 60, 80.) The reviewing court "must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." (*Burks v. United States* (1978) 437 U.S. 1, 17; *Hamling v. United States* (1974) 418 U.S. 87, 124; *Glasser v. United States, supra,* at 71.)

II

THERE IS SUFFICIENT SUBSTANTIAL EVIDENCE TO SUPPORT THE JUDGMENT OF THE JUVENILE COURT IN THE INSTANT CASE

Although disavowing an intention to do so, petitioner makes a frontal assault upon the integrity of the appellate court justices who decided his appeal. Petitioner argues that while the appellate court purported to apply the *Jackson* test to his appeal, they in fact used a lesser standard to examine the record of his trial and upheld his conviction because they "found a mere modicum of evidence to support it."[4]

The three justices who decided the appeal expressly stated that they applied the *Jackson* test to the facts of the case in arriving at their decision that there was substantial evidence supporting the judgment. (*In re Frederick Joseph G., supra,* 96 Cal.App.3d 353.)

Contrary to petitioner's suggestion there is far more than a mere modicum of evidence supporting the trial court judgment.

The case against petitioner was not based on circumstantial evidence and instead the evidence supplied by the prosecution's witnesses was direct eyewitness testimony.

Furthermore, Connie Balderas' eyewitness testimony regarding Liz Moore's presence at the K-Mart store; the fight in the cemetery; and the car driving over the body were all corroborated by a wholly independent and largely unimpeached eyewitness, Sandra Garcia.

The heart of petitioner's contention is his claim that Connie Balderas' testimony cannot be believed because it was significantly impeached, especially as to the physical location of the lighting around the cemetery. In this regard it should be noted that Sandra Garcia was able to see the struggle in the cemetery although standing some distance away from the fracas.

It is submitted that the important fact is whether there was adequate lighting for Connie to have seen the killing and not where the lights were physically located. Sandra

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[4]Petition for Writ of Certiorari, p. 23.

Garcia's testimony corroborates that of Connie Balderas on the important point as to the adequacy of the available lighting.

Connie Balderas' testimony is crisp and responsive in spite of a grueling and extended cross examination.

Connie's testimony has none of the characteristics of the minor's testimony in *In re Roderick P.* (1972) 7 Cal.3d 801 where a juvenile was found to have committed a violation of Penal Code section 192 (manslaughter). In *Roderick P.* the case against the minor was largely circumstantial and depended to a great extent upon the testimony of a thirteen-year old boy who testified in a "slow, hesitant and very reluctant manner". (7 Cal.3d at 807.) "Countless times during his testimony the minor was admonished for giving evasive or unresponsive answers. His testimony was very confused and contradictory." (*Id.* at 807).

More importantly, the discredited witness in *Roderick P.* gave no direct testimony implicating the juveniles in the murder, with the case being entirely circumstantial.

Connie Balderas' testimony was neither evasive nor nonresponsive; it was not confused or contradictory; nor was her testimony slow, hesitant or reluctant.

Her testimony concerning the murder is not inherently improbable and it was never established that there is a physical impossibility that her testimony is true nor is the falsity of her testimony apparent without resorting to inferences or deductions.

Respondent therefore submits that since there is sufficient substantial evidence to support the judgment, appellant's claim to the contrary must be dismissed.

III

THERE REMAIN SUBSTANTIAL AND COMPELLING REASONS FOR NOT EXTENDING THE RIGHT TO A JURY TRIAL TO JUVENILES

Although purporting to recognize this Court's opinion in *McKeiver v. Pennsylvania* (1971) 403 U.S. 528, petitioner nonetheless argues that he was improperly denied the right to a jury trial. Petitioner's argument is threefold. First, petitioner claims that none of the features of California's juvenile justice system which led this Court to deny minors the right to a jury trial in 1971 are still operative in California. Second, petitioner argues in favor of declaring a right to jury trials for juveniles based upon his assertion that minors are really being punished rather than rehabilitated in California. Finally, petitioner argues that he was improperly denied a jury trial because he faces a potential term of incarceration until he is 23 years old. None of these contentions have merit.

Under the California Juvenile Court Law a juvenile going to trial has the benefit of a trained, experienced and independent trier of fact—either a superior court judge alone or with the use of a referee (see *In re Edgar M.*, (1975) 14 Cal.3d 727)—hearing the evidence and then making a dispositional decision with the benevolent purposes of the Juvenile Court Law in mind. In California's larger counties, this means primarily judges and superior court commissioners acting as referees with long-term spe-

cialized assignments in juvenile court. (See *In re Edgar M., supra*, at 733, n. 6.)

Furthermore, it is still the rule in California that juvenile court proceedings are civil in nature and that the purpose of the juvenile court procedures is rehabilitative rather than punitive. (See, e.g., *In re Ricardo M.* (1975) 52 Cal.App.3d 744.)

In this regard Welfare and Institutions Code section 203 specifically provides that:

> "An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding."

The California Supreme Court has recently affirmed its earlier statements that the purpose of the juvenile court system is "guidance and treatment for the juvenile." (*In re Mitchell P.* (1978) 22 Cal.3d 946, 952; see also, *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767, 775.)

Neither can there be any doubt that the California juvenile court law fully satisfies the constitutional requirement announced in *In re Winship* (1970) 397 U.S. 358, 25 L.Ed. 2d 368 that the reasonable doubt standard be applied. (Welf. & Inst. Code, § 701; *In re Arthur N.*, (1976) 16 Cal. 3d 226, 234-240; *Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 378.) Although petitioner's case was heard by a judge, a minor whose case is heard by a referee has the absolute right, if he applies for a rehearing under Welfare and Institutions Code section 558, to have a de novo rehearing before a judge unless a judge makes a timely independent decision as to the minor's case after reading the

complete transcript of the proceedings. (*In re Damon C.* (1976) 16 Cal.3d 493; *In re Edgar M., supra*, 14 Cal.3d 727.) The right to appeal even orders involving misdemeanor offenses and certain Fish and Game and traffic offenses to the Court of Appeal is declared in Welfare and Institutions Code section 800. Furthermore, a juvenile unable to afford counsel is entitled to a free transcript. (Welf. & Inst. Code, § 800; *Dana J. v. Superior Court* (1971) 4 Cal.3d 836.

California law, in fact, goes beyond the apparent federal constitutional requirements. In the plurality opinion by this Court in *McKeiver v. Pennsylvania, supra,* 403 U.S. at p. 550, the justices recognized several provisions of juvenile court law which could create the likelihood of prejudgment in juvenile court proceedings, but nonetheless reached the conclusion that the right to jury trial was not constitutionally required. According to the opinion, concern about the provisions "chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." The expressed concern was "about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers."

However, most of these factors for concern do not exist in California. Ever since *In re Gladys R.* (1970) 1 Cal.3d 855, 859-869, a bifurcated hearing has been required in

California, and the trier of fact is generally not permitted to read the social study report prior to adjudication. (Cf. *In re Michael V.* (1974) 10 Cal.3d 676, 683; *Bryan v. Superior Court* (1972) 7 Cal.3d 575, 579, n. 2, cert. den., 410 U.S. 944 (1973), conviction vacated in *In re Bryan* (1976) 16 Cal.3d 782.) The provisions of Code of Civil Procedure, sections 170 through 170.8 (which permit the disqualification of judges) are applicable to juvenile court proceedings (cf. *People v. Superior Court (Tony S.)* (1975) 44 Cal.App.3d 904) and, effective January 1, 1977, section 170.6 was modified to apply specifically to referees. (Stats. 1976, ch. 1071, § 1; cr. *In re Edgar M., supra,* 14 Cal.3d 727, 732-733, n. 5.)

Effective January 1, 1977, Welfare and Institutions Code section 701 was amended to provide: "The admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision." (Stats. 1976, ch. 1071, § 27.) Among the rules governing the use of evidence in juvenile court is the same exclusionary rule applicable to criminal proceedings. (See *In re Michael V., supra,* at pp. 680-681.)

In a recent decision the California Supreme Court enumerated only a few of the basic due process protections available to juveniles in proceedings under Welfare and Institutions Code, section 602:

> "As a matter of due process or the right against self-incrimination, juveniles are entitled to the exclusion of illegally seized evidence, unconstitutional pretrial identification, judicial admission not proceeded by an explicit waiver of rights, and statements obtained without constitutional admonishments. [Citation.] They are also protected against multiple prosecutions. [Citation.] and from being twice placed in jeopardy in juvenile court proceedings [citation]." (*In re Mitchell P.* (1978) 22 Cal.3d 946.)

Juveniles have the same rights to pretrial discovery as are available to criminal defendants. *Joe Z. v. Superior Court* (1970) 3 Cal.3d 797.)

In light of the provisions of the California Juvenile Court Law discussed above, it appears that the California Juvenile Court factfinding procedures far exceed the constitutional requirements implied in *McKeiver v. Pennsylvania, supra,* at p. 550.

Petitioner argues that there is pressure being put on the judges of the juvenile court by the public and ambitious prosecutors to deal more strictly with minors. This was not litigated below. Assuming for purposes of argument that such public pressure exists, there are equally strong indications that juries drawn from the public would deal more harshly with minors than have the judges and referees.

Petitioner also insinuates that groups including prosecutors and police are attempting to influence juvenile court judges. Whether groups advocating any persuasion have exerted improper influence on juvenile court judges is a matter outside the record on appeal in the instant case. Petitioner does not allege that any such activities influenced the instant case. Petitioner clearly had open to him the provisions of sections 170 through 170.8 of the Code of Civil Procedure to challenge or disqualify a judge whom he felt had been subjected to such pressures.

A. The Dispositional Criteria in California Juvenile Court Proceedings Are Based Upon Rehabilitative Goals

The major thrust of petitioner's contention appears to be that California's Juvenile Court Law has utterly failed to achieve its rehabilitative objectives and that the juvenile court trials are now really criminal proceedings (Cf. Welf. & Inst. Code, § 203) with punitive goals. This Court in *McKeiver v. Pennsylvania, supra,* 403 U.S. 528, 543-551, was squarely faced with these issues. The plurality opinion expressly recognized that mandatory imposition of a jury trial requirement would destroy the juvenile court system and discourage further experimentation by the states. The effect of *McKeiver* is to permit the juvenile justice system to continue without jury trials and, in that manner, to permit further experimentation with progressive methods of rehabilitation. Petitioner's contention that jury trials should be granted because of imperfections in rehabilitative aspects of the system is therefore inconsistent with the spirit of *McKeiver*. Furthermore, there are authorities upholding the commitment of minors tried without a jury to an adult correctional facility. (*United States ex rel. Murray v. Owens* (2d Cir. 1972) 465 F.2d 289, cert. den., 409 U.S. 1117 (1973) *R. v. Cory* (1974) 353 N.Y.S.2d 783, 784, 44 A.D.2d 599.)

Petitioner argues that the rehabilitative goals of California's Juvenile Court Law have been eroded since 1971 and that his confinement is actually for the purposes of punishment and protection of the public rather than for rehabilitation. To the contrary, there has been no significant change in the statutory criteria governing commitment to the Youth Authority. In California a juvenile court cannot

remove a minor from his home or commit him to the Youth Authority unless the following statutory criteria are satisfied:

> "In all cases wherein a minor is adjudged a ward or dependent child of the court, the court may limit the control to be exercised over such ward or dependent child by any parent or guardian and shall by its order clearly and specifically set forth all such limitations, but no ward or dependent child shall be taken from the physical custody of a parent or guardian unless upon the hearing the court finds one of the following facts:
>
> "(a) That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for the minor.
>
> "(b) That the minor has been tried on probation in such custody and has failed to reform.
>
> "(c) That the welfare of the minor requires that his custody be taken from his parent or guardian. (Welf. & Inst. Code, § 726.)
>
> "No ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority." (Welf. & Inst. Code, § 734.) (See *In re Aline D.*, 14 Cal.3d 557; *In re Willy L.*, 56 Cal.App.3d 256, 263-264.)

Petitioner places great emphasis upon the 1977 and 1976 amendments to Welfare and Institutions Code section 202 defining the purposes of California's Juvenile Court Law.

As part of the alleged shift to retributive justice he stresses the addition of section 202(b) which makes the protection of the public one of the purposes of the juvenile court law. However, even before Welfare and Institutions Code section 202 (and its predecessor, former Welf. & Inst. Code § 502) was amended in 1976, California's Juvenile Court Law recognized the need for removing a minor from the custody of his parents in order to protect the public, since the statute, even prior to 1976, contained the following words:

> ". . . removing him [the minor] from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal. . . ."

Furthermore, ever since it was created in 1941 the purpose of the Youth Authority has been "to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of public offenses." Similarly, for more than thirty years Welfare and Institutions Code section 1765 has provided:

> "(a) Except as otherwise provided in this chapter, the Authority shall keep under continued study a person in its control and shall retain him, subject to the limitations of this chapter, under supervision and control so long as in its judgment such control is necessary for the protection of the public.
>
> "(b) The Authority shall discharge such person as soon as in its opinion there is reasonable probability that he can be given full liberty without danger to the public." (See also, Welf. & Inst. Code, §§ 1766, 1768, 1800, 1820, and 1850.)

Thus recent amendments to Welfare and Institutions Code section 202 did not effect any material change upon the criteria for removing a minor from his home and placing him in the Youth Authority or for retaining him under Youth Authority control.

Petitioner also cites the modification of Welfare and Institutions Code section 202 which was affected by Statutes of 1976, chapter 1071 (A.B. 3121), which added the additional statement of purpose "to impose on the minor a sense of responsibility for his own acts." That is clearly an appropriate rehabilitative goal in furtherance of the already existing purposes of California's Juvenile Court Law and does not amount to a significant change vis-a-vis the jury trial issue.

Petitioner also argues that the provisions of Statutes of 1976, chapter 1071 permitting the filing of petitions by the district attorney on behalf of the People also have detracted from the rehabilitative purposes of the Juvenile Court Law. This law did not take away the duties of the probation officer to make nonlegal decisions concerning whether a petition should be filed. In fact, the legislation constituted a strong step toward improving the rehabilitative functions of the court and creating diversion programs. Thus the following language was added to Welfare and Institutions Code section 654, the informal probation statute:

> "However, when in the judgment of the probation officer the interest of the minor and the community can be protected, the probation officer shall make a diligent effort to proceed under this section."

The district attorney's functions are primarily confined to his area of expertise in legal matters. This improves the system for the minor as well as the petitioner by insuring that cases lacking sufficient evidentiary support will not be filed and that petitions which are filed will be properly written. The new procedure also serves to allay any fears that the former procedure could, in a given instance, result in a denial of due process as a result of the probation officer's performance of dual rules in presenting evidence in support of the petition and making dispositional recommendations. (See *In re Steven C.*, 9 Cal.App.3d 255, 266, n. 11.)

Minors traditionally have less right to self-determination than adults. The concept of *parens partriae* is consistent with the right of parents to both control and punish their children. In addition, children may be required to attend school. Minors may thus be subjected to controls not applicable to adults.

The issue concerning attempts to categorize juvenile court dispositions as punitive or rehabilitative was discussed in *In re Ricardo M., supra,* 52 Cal.App.3d 744, 748-749. In that case the court recognized that rehabilitative conditions of probation often include proscriptions upon conduct which are arguably punitive. It should be observed that, in the case of a serious crime of the nature committed by petitioner, the reason why petitioner is in need of rehabilitation is based largely upon the behavior he has exhibited which poses a danger to society. Thus the two concepts cannot wholly be separated. Since petitioner has engaged in serious violent conduct, it is to his benefit to be confined so that he cannot engage in additional similar

acts which could cause additional guilt feelings when he realizes the seriousness of his conduct and so that his energies can be directed toward more constructive pursuits before he has the opportunity to become more fully committed to the lifestyle he has exhibited.

It is therefore clear that petitioner's commitment to the Youth Authority was based on a finding that he would benefit from such a commitment within the terms of Welfare and Institutions Code section 734. This standard, turning on benefit to the minor, was the standard accentuated by *In re Aline D., supra,* 14 Cal.3d 557, the standard in effect when the Supreme Court reiterated the jury trial rule in *People v. Superior Court (Carl W.), supra,* 15 Cal. 3d 271, 274, and the standard still in effect to this day.

B. The Factfinding Procedure Involving the Use of Judges and Referees is an Integral Part of the Juvenile Court Law

This portion of respondent's argument will explore the effects upon California's Juvenile Justice System of a holding that a jury trial is constitutionally mandated. From some of the previously cited cases, most notably *McKeiver v. Pennsylvania, supra,* 403 U.S. 528, it is apparent that the effect on the Juvenile Justice System is a relevant factor in determining whether a jury trial should be constitutionally mandated in juvenile court.

The following are a sampling of court opinions involving the severability of an unconstitutional provision from the remainder of the legislation in which it is found:

> "An unconstitutional provision is severable from a statute if the remainder is 'complete in itself' and

would have been adopted without the severed provision. (*People v. Navarro* (1972) 7 Cal.3d 248, 260 . . .; *In re Bell* (1942) 19 Cal.2d 488, 498 . . .)" (*Leaming v. Municipal Court* (1974) 12 Cal.3d 813, 816.)

"When part of a statute is declared unconstitutional the remainder will stand if it is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation. (*In re Bell* (1942) 19 Cal.2d 488, 498 . . .) Deletion of the challenged provision would leave a coherent amended statute complete in itself, but the critical inquiry is whether the Legislature would have adopted the entire amendment had it foreseen the partial invalidity thereof. (*In re Perez* (1966) 65 Cal.2d 224, 232 . . .) Generally, unconstitutional provisions do not vitiate the whole act unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it without such obnoxious provisions. (*Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536, 555 . . .; *People v. Lewis* (1939) 13 Cal.2d 280, 284 . . .; *People v. Clay, supra,* 18 Cal.App.3d 964, 971.)" (*People v. Navarro,* 7 Cal.3d 248, 260.)

"In any event, the question is actually one of severability. The test of severability is whether the invalid parts of an enactment can be severed from the otherwise valid parts without destroying the legislative scheme or the utility of the remaining provisions. (*Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228, 238 . . .) Stated differently, an unconstitutional enactment will be upheld in part only if it can be said that that part is complete in itself and would have been adopted even if the legislative body had foreseen the partial invalidation of the enactment. (*Verner, Hilby & Dunn v. City of Monte Sereno*

(1966) 245 Cal.App.2d 29, 35 . . .)" (*Kornblum v. Newark Unified Sch. Dist.,* 37 Cal.App.3d 623, 628.

". . . . If elimination of objectionable parts of a statute requires a wholesale rewriting, a court's attempt to do so transgresses both the legislative intent and the judicial function. (*Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 25 . . .; *People v. Stevenson* (1962) 58 Cal.2d 794, 798 . . .; *Los Angeles v. Lewis* (1917) 175 Cal. 777, 781 . . .)" (*In re King,* 3 Cal.3d 226, 237, cert. denied, 403 U.S. 931 (1971). (See also, *Rockwell v. Superior Court,* Cal. Sup. Ct. No. L.A. 30645, filed December 7, 1976, Slip Opinion p. 38.

Respondent submits that the present factfinding procedure utilizing judges and referees is such an integral part of California's Juvenile Court Law that a court declaring a right to jury trial would find it virtually impossible to ascertain legislative intent in light of a jury trial requirement. Such a court would also be faced with a task properly left to the Legislature—that of rewriting the Juvenile Court Law.

According to the plurality opinion in *McKeiver v. Pennsylvania, supra,* 403 U.S. 528, 550, if the jury trial were to be injected into the juvenile court system as a matter of right it would bring with it into the system the traditional delay, the formality and the clamor of the adversary system and possibly the public trial. In conclusion the opinion stated at page 551:

"If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence.

> Perhaps the ultimate dissolutionment will come one day, but for the moment we are disinclined to give impetus to it."

The discussion in *McKeiver, supra,* at pages 543-551, therefore supports the conclusion that the absence of a jury trial from the juvenile court factfinding process is such an integral part of the system that severance is impossible.

Petitioner points to the failure of the juvenile justice system to totally live up to its rehabilitative goals and argues that this alleged failure compels affording juveniles the right to a jury trial. If the reasoning of petitioner's brief is adopted as a rationale for declaring a right to jury trial, there may be no reason for the separate existence of a juvenile court to deal with criminal offenses committed by minors. Under the above rationale, extension of traditional criminal law concepts to minors would result in no loss to the justice system and would merely ensure that all rights afforded to adults would also be granted to minors. As suggested by *McKeiver, supra,* if legislators were faced with a requirement that minors be granted all the rights afforded to adults, they might well abandon the principle that minors are entitled to efforts at rehabilitation in favor of a policy that persons accorded the same rights as adults should face the same or similar retributive justice.

Under the current juvenile justice system minors have received substantially more lenient terms than those imposed for adults committing the same or similar offenses. Thus, petitioner's claim that California imposes "massive"[5]

[5]Petition for Certiorari, page 8.

curtailment of liberty upon juveniles has been rejected by the California Supreme Court:

> "While adjudication of a juvenile offender may well result in an incarceration which is not unlike that in the case of persons convicted of crimes, it must be acknowledged that a person convicted of a serious crime is generally exposed to a greater and more onerous term of confinement than a juvenile ward charged with the same misconduct." (*In re Mitchell P., supra,* 22 Cal.3d at 952.)

The California Legislature has taken great care to create a separate juvenile court system uniquely designed to carry out the purposes of the Juvenile Court Law. It has already been noted that Welfare and Institutions Code section 203 provides that proceedings in juvenile court are not criminal.

Welfare and Institutions Code section 202 provides:

> "(a) The purpose of this chapter is to secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the state; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents. This chapter shall be liberally construed to carry out these purposes.
>
> "(b) The purpose of this chapter also includes the protection of the public from the consequences of crim-

inal activity, and to such purpose probation officers, peace officers, and juvenile courts shall take into account such protection of the public in their determinations under this chapter."

It is required that each superior court in the state have a presiding judge of the juvenile court and such other designated judges as may be necessary for the prompt disposition of the judicial business before the juvenile court. While sitting in the exercise of the jurisdiction conferred by the Juvenile Court Law, the superior court is known and referred to as the juvenile court. (Welf. & Inst. Code, §§ 550-551.) The Juvenile Court Law provides for the appointment of commissions and committees and the creation of programs to assist the court and its officers in the carrying out of its functions. (Welf. & Inst. Code, §§ 525-532, 1790-1799.)

Segregated detention facilities are required. (Welf. & Inst. Code, §§ 507-510.) Provisions are made for the establishment of juvenile halls, juvenile homes, ranches and camps. (Welf. & Inst. Code, §§ 850-893.) Special procedures are created for dealing with minors short of the initiation of court proceedings. (Welf. & Inst. Code, §§ 626, 652, 654.) All of the above provisions, as well as other provisions of the Juvenile Court Law, help to create a system of specialized factfinding and specialized rehabilitative programs directed toward fulfilling the needs of each minor. As the California Supreme Court stated in *In re William M.*, 3 Cal.3d 16, 31: "The basic predicate of the Juvenile Court Law is that each juvenile be treated as an individual."

As part of the juvenile court system, a separate record-keeping system has been established to insure the privacy of the minors' records and to protect minors from the stigma of criminality. (See Welf. & Inst. Code, §§ 504, 825-828.) These provisions permit the court to maintain effective control over the records with the added advantage to the minors that later record sealing under Welfare and Institutions Code section 781 may be more effective. (See generally, *T.N.G. v. Superior Court, supra,* 4 Cal.3d 767.)

Welfare and Institutions Code section 679 allows for certain participation in the proceedings by a minor's parent. Welfare and Institutions Code section 680 provides:

> "The judge of the juvenile court shall control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought. Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons interested in his welfare with such provisions as the court may make for the disposition and care of such minor." (See *People v. Superior Court (Carl W.), supra,* 15 Cal.3d 271, 280-283.)

The formalities of a jury trial would make parental participation more difficult since the participation of multiple parties would be more disruptive in jury proceedings than in court proceedings. Jury trials would greatly reduce the latitude of the court under Welfare and Institutions Code

section 680 to conduct proceedings in an informal atmosphere.

However, a very major effect of jury trials would be to totally undermine the provisions for maintaining the privacy of juvenile court records. It may be argued that in cases where a minor would not wish a jury trial, he could simply waive his right to jury trial. However, article I, section 16 of the California Constitution provides:

> "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
>
> "In civil causes and cases of misdemeanor the jury may consist of 12 or a lesser number agreed on by the parties in open court."

It is therefore clear, whether juvenile court proceedings are labeled civil or criminal, if the right to jury trial applies, the moving party would be entitled to a jury trial whether or not a jury trial is desired by the minor. (See *People v. Terry* (1970) 2 Cal.3d 362, 377-378, cert. dism., 406 U.S. 912; *People v. Stoll* (1904) 143 Cal. 689, 696; see also *Singer v. United States* (1965) 380 U.S. 24, 36.)

Therefore, even minors desiring privacy could be subjected to the public participation in the proceeding associated with jury trial. It is doubtful that participation by the public as jurors can be separated from other public participation in juvenile court proceedings. After 12 members of the public have listened to the facts of a minor's case, it would be unrealistic and an unwarranted burden upon the jurors to expect them to maintain silence after the completion of the trial. Thus, in *Oklahoma Publishing Company v. District Court* (1977) 430 U.S. 308, 51 L.Ed.2d 355, 97 S.Ct. 1045, this Court permitted publication of information already made public concerning the identity of a minor entitled to a private hearing under state law. (See also *Nebraska Press Association v. Stuart* (1976) 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 279; *Cox Broadcasting Corporation v. Cohn* (1975) 420 U.S. 469, 491, 495, regarding the broad rights of the press to publish information concerning public court proceedings.

Other provisions of the Juvenile Court Law which would be affected if the right to jury trial were declared are those provisions designating short time limits for the trial of juvenile cases. (See Welf. & Inst. Code, §§ 631-632, 636-638, 657, 660, 700, 700.5, 702). The time limits imposed by the Juvenile Court Law are significantly shorter than those imposed for criminal proceedings. In addition, the juvenile court statutes do not contain the language in Penal Code section 1382 permitting the granting of a continuance to the People when good cause is shown. Thus, if the right to jury trial were declared in juvenile court proceedings, it would be necessary to rewrite the statutory provisions in the Juvenile Court Law which presently impose strict time limits for the proceedings.

On the other hand, the delay of juvenile court proceedings for any reason has the undesirable effect of delaying the commencement of rehabilitation. In addition, delays

in most cases can result in a shortened period of treatment under the Juvenile Court Law since the maximum period of juvenile court or youth authority jurisdiction is, in most instances, limited by the minor's age. (See Welf. & Inst. Code, §§ 607, 1769; *People v. Olivas, supra,* 17 Cal.3d 236, 241, n. 5; Stats. 1976, ch. 1071, §§ 13, 14.5, 28, 29, 30, amending Welf. & Inst. Code, §§ 607, 702, 726, 731, and adding Welf. & Inst. Code § 656.1). A minor's inability to be successfully treated before juvenile court jurisdiction expires can be the determinative factor in a decision to certify him for criminal prosecution. (See *Jimmy H. v. Superior Court* (1970) 3 Cal.3d 709, 715). If it becomes impossible to ensure the prompt completion of juvenile court proceedings as a result of delays traditionally associated with jury trials, it will undoubtedly be necessary to abandon the Juvenile Court Law in favor of the Criminal Law, which permits the same period of control over the defendant regardless of the duration of the court proceedings.

An additional extremely important factor in evaluating what legislation would have been enacted had the Legislature foreseen a jury trial requirement is the factor of cost. The cost required to provide jury trials to minors would be extremely high and the funds available to government are not unlimited, especially in California. It is probable that, if the Legislature had foreseen a jury trial requirement, the Legislature would have found it necessary to cut back on or eliminate juvenile court programs in order to provide funding for jury trials.

In Statutes of 1976, chapter 1071, sections 9 and 35, the Legislature amended Welfare and Institutions Code section 553 to provide stricter requirements of eligibility for referees and has declared an intent to increase the ratio of judges to referees in juvenile court. This expression of legislative intent will probably result in a gradual changeover from the use of referees to the use of judges. To declare judicially a right to jury trial might require an immediate abolition of juvenile court referees since the cost of two jury trials in a single case, should a rehearing be granted, would be excessive. Furthermore, the procedures for review by the judge pursuant to Welfare and Institutions Code section 558 would have to be entirely reconsidered since it is illogical to provide for the granting of a de novo rehearing by a judge in a case where a jury has made a factual determination. In any case, the introduction of jury trials into juvenile court would result in longer court proceedings and would therefore require more judges.

Furthermore, juvenile court buildings have been constructed to accommodate the informal proceedings contemplated under the Welfare and Institutions Code. In order to accommodate jury trials, new, larger and more formal courtrooms with jury boxes and jury rooms would have to be constructed. It may also be necessary to provide reporters for referee courts currently operating without them. There would be fees and expenses directly related to the selection of jurors, fees which must be paid to jurors who serve, extra court time required for jury selection and deliberation, and extra parking spaces at the courthouse for jurors. All of these innovations would require

substantial planning and financing and could not be realistically accomplished overnight.

On the other hand, the Legislature has placed priorities for expenditures in other areas of the juvenile court system. Enactments such as Stats. 1976, ch. 1071 (A.B. 3121) have resulted in added expenditures in the areas of rehabilitation and diversion. Chapter 1071, section 22 expanded Welfare and Institutions Code section 654 providing for informal probation. Chapter 1071, section 32 enacting Welfare and Institutions Code sections 840 and 841 provided for the creation of home supervision programs. It is doubtful that these rehabilitation and diversion programs would have been expanded had the Legislature anticipated the cost of jury trials.

It is not possible in this brief to analyze all the cost factors connected with various alternative procedures for juveniles or to introduce expert testimony on these matters. However, it is undoubtedly more expensive to provide probation officers to participate at all stages of the juvenile court proceedings than it is to provide probation officers to participate only at the sentencing phase of criminal proceedings. It is also undoubtedly more expensive to maintain a separate court system for juveniles as well as a separate recordkeeping system than it would be to permit commingling. It is possibly also more expensive in certain respects to hold all juvenile court trials in superior court than it would be to have misdemeanors and infractions heard before the municipal court. The expenses of appeal are certainly greater under the Juvenile Court Law since even misdemeanors and some infractions may be appealed directly to the Court of Appeal. (Welf. &

Inst. Code, § 800.) In adult misdemeanor and infraction proceedings, such appeals would be heard before the appellate division of the superior court.

In summary, it is clear that the present factfinding procedure is an integral part of the Juvenile Court Law. A declaration that jury trials are required would necessitate a substantial rewriting of the Juvenile Court Law. In light of the many countervailing cost considerations and the unique provisions of the Juvenile Court Law, it is possible that the Legislature would not have created a separate juvenile court with the many associated diversion and rehabilitative functions had the Legislature foreseen a jury trial requirement. In light of the many considerations discussed above, respondent submits that a rational distinction may properly be drawn between juveniles and other members of the public and that the State has a compelling interest in maintaining the integrity of the Juvenile Court Law, which would be drastically affected if a right to jury trial were declared. (See *In re Gary W., supra,* 5 Cal.3d 296, 305-306.)

C. The Fact That a Juvenile Who Has Committed a Murder is Subject to the Youth Authority's Jurisdiction Until They Are Twenty Three Does Not Require Extending the Right to Jury Trials to Minors

Petitioner argues that because he was facing a potential term of incarceration until his 23d birthday he was unconstitutionally denied a jury trial. Admittedly, the vast majority of jurisdictions in the United States provide that a juvenile court retains control over a minor until that person reaches 21 years of age.

This is also the general rule in California. (Welf. & Inst. Code, § 1769(a).) This rule is different only in a case where a juvenile is committed to the Youth Authority based on his commission of one of the eight serious felonies enumerated in Welfare and Institutions Code section 707(d). In such cases a minor is subject to discharge upon the expiration of a two-year period of control or on their 23d birthday, whichever occurs later.

It is also a rule in California that:

> "In any case in which the minor is removed from the physical custody of his parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." (Welf. & Inst. Code, § 726.)

Thus, even juveniles committed under section 1769(b) may not be held for a period in excess of the maximum term of imprisonment which an adult could receive.

With respect to his contention regarding the possibility of incarceration until his 23d birthday, petitioner claims that no other American jurisdiction keeps persons beyond their majority for crimes committed during their minority without affording them a jury trial. Such is not the case.

Thus, New Jersey provides for a similar commitment to that of petitioner's for juveniles convicted of homicide:

> "Commit the juvenile to a suitable institution maintained for the rehabilitation of delinquents for an indeterminate term not to exceed 3 years; except, that, any time an adjudication of juvenile delinquency is predicated upon an offense which, if committed by a person of the age of 18 years or over would constitute any form of homicide as defined in N.J.S.A. 2A:113-1, 2A:113-4 or 2A:113-5 then the period of confinement shall be indeterminate and shall continue until the appropriate paroling authority determines that such person should be paroled; and, except that in any case the period of confinement and parole shall not exceed the maximum provided by law for such offense if committed by a person of the age of 18 years or over.
>
> "Any juvenile committed under this act who is released on parole prior to the expiration of his maximum term may be retained under parole supervision for a period not exceeding the unserved portion of the term." (N.J.S.A. 2A:4-61(h).)

Petitioner also claims that his term may be indefinitely extended without a jury trial under Welfare and Institutions Code section 1800. Neither is this the case.

It is true that under Welfare and Institutions Code section 1800 the Youth Authority Board may make an application to the committing court for an extension of a juvenile's term where discharge of the minor would be physically dangerous to the public.

There is more to the process of extending a juvenile's term, however, than the application under Welfare and Institutions Code section 1800. Thus, under Welfare and Institutions Code section 1801 the court must conduct a

hearing on whether to discharge the juvenile. More importantly, Welfare and Institutions Code section 1801.5 provides that the juvenile has a right to a jury tral on the issue of whether he is a danger to the public.

Thus, it is untrue to argue that a juvenile is subject to an indefinite commitment without the right to a jury trial. What petitioner's contention boils down to is his claim that without a jury trial he cannot be constitutionally incarcerated for rehabilitative purposes beyond the age of 21 because the state loses its *parens patriae* interest when he reaches majority.

Petitioner apparently concedes that when he was committed to the Youth Authority at age 17, the state had a valid *parens patriae* interest in his rehabilitation. Petitioner argues that merely because he did not have a jury trial, the state must relinquish its interest in completing the rehabilitative program established for his benefit simply because he reached 21 years of age.

It is respondent's contention that once the state begins a rehabilitative program designed to deal with juveniles who have committed serious felonious acts, it has a compelling interest in completing that program. Furthermore, such commitments, once initiated, can run beyond the time when the minor reaches the legal age of majority even though not based on a jury trial.

In California, Youth Authority commitments are, as one court has held, "in no way equivalent of the commitment of the adult to prison." (*In re Robert D.* (1979) 95 Cal.App.3d 767, 775.)

In analyzing the differences between a Youth Authority commitment and a term of imprisonment in state prison, the court in *In re Robert D., supra,* 95 Cal.App.3d at p. 775, noted:

> "When the juvenile is committed for the maximum period, he is in fact being committed for an indeterminate period. The adult sent to prison for the upper 'term prescribed' will be confined for that specific period less any behavior-performance credits. (Pen. Code, §§ 2930-2931.) At the heart of the determinate sentence law is the concept of a fixed term.
>
> "In contrast, to the juvenile, the 'maximum' term is simply the outside time limit for a statutory program aimed directly at rehabilitation. A youth committed to the CYA may be permitted his liberty, under supervision, under conditions 'best designed for the protection of the public.' (Welf. & Inst. Code, § 1766, subd. (a).) Thus the youth may be *immediately* released back to the community; thereafter he may be ordered reconfined, and again released under supervision, as often as conditions indicate to be desirable. (Welf. & Inst. Code, § 1766, subds. (c)-(f).)"

In commenting on the constitutionality of Welfare and Institutions Code section 1769(b) which permits incarceration until a juvenile is 23 years old, the court in *In re Robert D., supra,* 95 Cal.App.3d 767, 777 held:

> "These legislative choices as to maximum length of detention, variable times for release within the maximum period must be viewed in the light of the powers and duties of the Youth Authority and the facilities available and authorized for use by them to fulfill the treatment, rehabilitative aim mandated by the Legislature. Such words and phrases as 'hospitals,' 'camps,' 'schools,' 'training facilities,' 'study, treatment, diag-

nosis,' 'deposit' and 'investment of ward funds,' 'schools for the mentally disturbed,' 'payment of wages to wards for work,' 'conservation work,' stand out as beacons, legislative guideposts given to the Youth Authority as the means of rehabilitation. The Legislature has in fact created two distinct systems: one for adult criminals who are to be punished by a fixed period of incarceration and the other a totally separate system for juveniles who are to be rehabilitated by treatment in the Youth Authority. The differences between these two systems are specific concrete demonstrations of the underlying legislative determination that minors are inherently different from adults and therefore should be treated differently."

The provisions of Welfare and Institutions Code section 1769(b) are not unlike two former provisions of the Federal Youth Corrections Act (18 U.S.C. §§ 5010, 5017) which authorized incarceration of young adult offenders between the ages of 18 and 22 for periods up to six years. Although amended by 18 U.S.C. § 5037(b), which provided for discharge from federal custody at twenty-one, the courts which reviewed these former provisions allowing for extended rehabilitation upheld the rationale for longer detention of youthful offenders stating:

> ". . . the basic theory of that Act is rehabilitative and in a sense this rehabilitation may be regarded as comprising the *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison. The reasoning of the *Cunningham* court is relevant in this connection. The court there noted that the Youth Corrections Act 'provides for and affords youthful offenders, . . . not heavier penalties and punishment than are imposed upon adult offenders, but the opportunity to escape from the physical and psychological shocks and traumas attendant upon serving an ordinary penal sentence while obtaining the benefits of corrective treatment, looking to rehabilitation and social redemption and restoration.' 256 F.2d at 472." (*Carter v. United States* (D.C. Cir. 1962) 306 F.2d 283, 285.)

In summary then, the court in *In re Robert D., supra,* 95 Cal.App.3d 776-777 capsularized the State's interest in detaining juveniles until a program of rehabilitation can be completed by stating:

> "Punishment can be meted out in precise time units but modification of behavior is not a task subject to similar quantification. One youth may have 'insight' when he hears the first door closed and locked behind him. Another may not perceive the error of his ways and adjust his behavior for months or years. Some never will."

Respondent submits that since the State has a compelling interest in completing rehabilitation programs which have been initiated for juveniles who have committed serious felonious acts, it may subject petitioner to potential custody until his twenty-third birthday even though his commitment was not based on a jury trial.

D. Neither the Equal Protection Clause Nor the Due Process Clause of the Fourteenth Amendment Require That Juveniles Be Afforded Jury Trials

The California Supreme Court has discussed the relationship between equal protection and due process as follows:

"'Equal protection does not require that all persons be dealt with identically' (*Baxstrom v. Herold* (1966) 383 U.S. 107, 111 . . .); it permits a state to 'provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' (*Douglas v. California* (1963) 372 U.S. 353, 366 . . .) 'The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' (*Pury & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578 . . .: see *In re Antazo* (1970) 3 Cal.3d 100, 110 . . ." (*T.N.G. v. Superior Court* (1971) 4 Cal.3d 767, 783.)

The Court of Appeal in *Card v. Community Redevelopment Agency* (1976) 61 Cal.App.3d 570, 581, modified at 62 Cal.App.3d 316b, stated:

> "Due process of law in the substantive sense demands equality of treatment among those similarly situated. (Citations.)"

This Court's analysis in *McKeiver v. Pennsylvania, supra,* 403 U.S. 523, was discussed primarily in terms of due process. It was agreed by the litigants that the applicable due process standard in juvenile proceedings is fundamental fairness. (*McKeiver v. Pennsylvania, supra,* at 543.) However, the conclusion expressed in the plurality opinion of Justice Blackmun, at 403 U.S. 545, is that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. This statement is not limited to a due process standard alone, but appears to be broad enough to cover any arguable constitutional theory.

In actuality, Justice Blackmun's analysis in *McKeiver* appears to cover both due process and equal protection theories. The court in *In re R.C.* (1974) 39 Cal.App.3d 887, 896, stated:

> "Although due process includes the right to trial by jury in state criminal proceedings (*Duncan v. Louisiana* (1968) 391 U.S. 145 . . .), equal protection does not require that the juvenile court use juries. (See *McKeiver v. Pennsylvania, supra,* 403 U.S. 528.)"

Thus the Court of Appeal in *R.C.* appears to cite *McKeiver* as authority for the rule that equal protection does not require jury trials in juvenile court. The citation to *McKeiver* is appropriate.

The basis of the standard in *In re Gary W., supra,* 5 Cal.3d 296, 306, is that in cases where a statute affects a fundamental interest or employs a suspect classification, the State bears the burden of establishing that it has a compelling interest which justifies the law and that the distinction is necessary to further that purpose. Under the "compelling interest" test, as otherwise stated, the State must demonstrate that a classification serves a compelling governmental interest and that there are no reasonable less intrusive means by which the goals of the State can be achieved. (*Choudhry v. Free* (1976) 17 Cal.3d 660, 664.)

Justice Blackmun's analysis in *McKeiver* clearly recognizes that adult criminal defendants are afforded jury trials. The issue in *McKeiver* was whether the adjudicative phase of a juvenile proceeding should be equated with a criminal trial. (403 U.S. at 550.) The opinion fully ana-

lyzed both the beneficial and detrimental aspects of the juvenile court system. The opinion also weighed the benefits which would accrue from jury trials against the harm which would come to the juvenile justice system if jury trials were required. Comparing the analysis in *McKeiver* with the equal protection standards set forth in *Gary W.*, it appears illogical to find that a fundamental interest is significantly affected in a situation where the fundamental fairness standard of due process is not violated. It also appears illogical to conclude that a suspect classification is involved in a situation where due process does not require that a right afforded to adult criminals also be afforded to juveniles. Furthermore, insofar as the court in *McKeiver* analyzes the effects that the imposition of jury trial would have upon the juvenile justice system and concludes that the system should be preserved, the analysis clearly recognizes a compelling state interest justifying the present factfinding system.

Even when ruling in favor of a juvenile on a double jeopardy issue, this Court in *Breed v. Jones* (1975) 421 U.S. 519, 537), stated that "courts should be reluctant to impose on the juvenile-court system any additional requirements which could so strain its resources as to endanger its unique functions." In making its decision, the court took care to analyze the effects of its ruling upon the juvenile justice system.

In regard to equal protection and due process, this Court has stated:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment

> which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. [Footnote omitted.]" (*Bolling v. Sharpe* (1954) 347 U.S. 497, 499.)

This analysis supports respondent's position that, in the instant situation, due process is the stricter standard and a ruling that due process does not mandate jury trial in juvenile court is also dispositive of the equal protection issue.

E. The Existing Law Declaring That There is No Constitutional Right to Jury Trial in Juvenile Court Proceedings is Still Valid

To summarize, both the California Supreme Court and this Court have consistently held that neither the State nor the federal Constitution guarantees a jury trial in a juvenile proceeding. There has been no significant change suggesting the need for reconsideration of this principle since either the *McKeiver* or *Carl W.* decisions. The present factfinding procedures are in full compliance with constitutional requirements. To adopt petitioner's arguments concerning the failure of rehabilitative efforts would countervene the policy expressed in *McKeiver v. Pennsylvania*, *supra*, that continuing efforts toward rehabilitation by the states are desirable. Statutes of 1976, chapter 1071, evi-

dences significant attempts by the Legislature to further rehabilitative goals. On the other hand, the present fact-finding procedure involving the use of judges and referees in juvenile court is an integral part of the Juvenile Court Law. Respondent submits that the rule recently expressed by the California Supreme Court in *People v. Superior Court (Carl W.), supra,* 15 Cal.3d 271, 274, should be continued in effect.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the instant application for writ of certiorari be denied.

Respectfully submitted,

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(Appendix A follows)

APPENDIX A

Appendix A

CERTIFIED FOR PUBLICATION

In the Court of Appeal
of the
State of California

Fifth Appellate District

5 Civil No. 4311
(Super. Ct. No. 44425)

In re Frederick Joseph G., a Person Coming Under the Juvenile Court Law.
The People, Plaintiff and Respondent, vs. Frederick Joseph G., Defendant and Appellant.

[Filed Aug. 24, 1979]

OPINION

APPEAL from a judgment of the Superior Court of Kern County, sitting as a juvenile court, finding jurisdiction and determining deposition. Walter Osborn, Jr., Judge. Affirmed.

Quin Denvir, State Public Defender, under appointment by the Court of Appeal, Ezra Hendon, Chief Assistant

State Public Defender, and Laurance S. Smith, Deputy State Public Defender, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Edmund D. McMurray and Wm. George Prahl, Deputy Attorneys General, for Plaintiff and Respondent.

Frederick Joseph G., a minor, aged 17 years, was found to be a person coming within the provisions of Welfare and Institutions Code section 602 in that he was guilty of murder in the second degree (Pen. Code, §§ 187, 189). He was committed to the C.Y.A. and appeals. The central theme of appellant's scenario is that the evidence was insufficient to support the trial court's judgment if the record is evaluated under the proper standard of review.

FACTS

Detective Singleton testified that on Tuesday, March 14, 1978, at about 8 a.m., he was called to the Union Cemetery in Bakersfield to investigate the murder of Liz Moore. He found the victim lying on her back in a spread-eagle fashion in a crossroads. She had on Levi's which were buttoned but unzipped. There was blood on her head and the pavement below, a laceration on her left ear and an abrasion on the left cheek area. There was also a laceration on the right side of her head above the ear. A black and brown elastic belt was tied around her neck. There were abrasions on her back also. Detective Singleton also testified that there were needle marks on the victim's arms, the ring on her left hand had been smashed and there was an abrasion

on her right hand. A curb feeler from an automobile was found next to the victim's body.

At the trial Connie Balderas testified that on the night before the murder (Sunday, March 12) the victim was at her house with someone named Chris, Frank G. (appellant's brother), Lillian Ortiz and appellant. She stated that they partied all afternoon, using heroin, angel dust and marijuana. She stated that they later left and went to El Montecito and La Capa, two bars, with Pete Ramirez. They couldn't get into the bars because Pete wasn't old enough, so they went back to Balderas' house. She testified that she got up at 7:30 the next morning (Monday, March 13) and she and the victim used heroin. She then left for work at a car wash.

After work, she saw the victim on the street. Balderas used heroin, and although she didn't see the victim use it she assumed she did.

Counsel stipulated that expert testimony would establish that blood and bile samples taken from the victim were tested and were found to not contain any traceable quantities of heroin. It was also stipulated that the expert would testify that it would be improbable that heroin would be completely eliminated from the bloodstream in only eight hours.

Balderas testified that she and the victim left to go to California Park and met Frank, Lillian Ortiz and appellant. They first went to K-Mart and the liquor store, then to Union Cemetery. At the cemetery, Frank G. and Lillian Ortiz had sexual intercourse. Appellant attempted the same with the victim, who later told Balderas he had been unable

to accomplish the act. Appellant told her to "shut up" and seemed embarrassed by the victim's statement. The victim and Balderas teased appellant about his inability to perform sexually.

Balderas testified that the victim and Lillian Ortiz got into a fight over Balderas' boyfriend. The fight started when the victim began kidding with Lillian that she had had sexual intercourse with Balderas' boyfriend. The victim took off her belt and hit Lillian with it. Lillian then asked appellant for his belt, and he gave it to her. The two women began fighting with the belts. Balderas got between Liz and Lillian and asked them to stop fighting. Liz tried to get away from the fight by running. Appellant, however, began running after Liz cussing at her. Appellant said he was going "to show this bitch how to run." Appellant lassoed Liz around her neck with the belt he had taken off and given to Lillian. Liz fell to her knees and fought with appellant to get the belt off her neck. Balderas pulled at appellant's hair and tried to pull him away from Liz. Meanwhile, Lillian kicked Liz Moore in the cheek. Liz then fell to the ground on her stomach and stopped fighting. The belt was around her neck with a knot tied in the back. Balderas did not see appellant actually tie a knot around the victim's neck. However, Balderas never saw Lillian in a position to have knotted the belt around Liz Moore's neck. After Liz had fallen to the ground, appellant said "Oh, my God, I've killed her."

Balderas stated that everyone then got in the car and ran over the victim, which turned the body over so she was on her back.

Balderas testified that after the rest of the group left the cemetery she got out of the car and returned. She picked up the victim and twisted the belt around to try to loosen it so as to "help her out."

Several days later, appellant, Frank G. and "Fat Eddie" came to her house to clean the car, but Ms. Balderas refused to let them. Lillian Ortiz, Frank G. and appellant came later to discuss their stories regarding the incident.

Balderas stated she called the police a day or two after the murder and about a month later but didn't tell the officers the truth because she was scared. The first time she told the officer that she believed Lillian Ortiz to be responsible for the murder. On the second occasion she told the police that decedent had "burned" some people over a quantity of heroin and that several days before the homocide appellant and Frank G. had been at Connie's house and had said they would get the victim for that.

When questioned regarding promises made to Balderas while interrogating her, Detective Singleton testified that he told her she wouldn't go to jail if she was not involved in the actual homicide and that if she wanted to leave town the police would assist her. When questioned as to promises made regarding her boyfriend who was incarcerated, Detective Singleton replied: "I told her that at the conclusion, if she wanted to go to Texas, we would send her to Texas if we could and also we would send Benny if she wanted him to go or to assist." Balderas was not given immunity from prosecution for the crime. During the trial she was extended immunity as to her admission about heroin use only.

Detective Singleton contacted Sandra Garcia at juvenile hall. Garcia told him that on Monday, March 13 at about 7 p.m. she was at K-Mart buying paint; she saw the victim with Larry Montez. The victim asked her to go riding with them, but she declined and they left in a white station wagon with two males and two females. Ms. Garcia stated she left K-Mart and went to California Park and sniffed paint and smoked angel dust. The vehicle passed again with the same occupants, and she again declined the victim's offer to go riding. Garcia decided to go to her stepmother's near Union Cemetery. At about 8 or 8:30, as she walked through the cemetery, she saw two females fighting near a vehicle and heard a moan as one fell to the ground. She then saw people get into the car and drive past her and noticed Larry Montez was still driving the vehicle. Detective Singleton took Garcia to the scene where she pointed out the area in which the fight occurred. It was approximately where the body was found.

Detective Singleton subsequently recontacted Garcia, who then indicated that her prior story regarding seeing the victim with Larry Montez was not true. She refused to tell him who was with the victim.

At trial Sandra Garcia testified that she saw the victim at K-Mart at 7:30 on Monday night with a Mexican man but not appellant. She left K-Mart and went to California Park and saw the victim in the same car. Garcia then went to the cemetery. She said there was enough light for her to see two girls arguing and fighting. One of the females fell. The others got in a car and ran over the body. Ms. Garcia testified that the car was the same one she saw at

K-Mart and that the male accompanying the victim looked like Larry Montez. She said that when questioned by Detective Singleton he told her she was lying and appellant was involved, and she refused to talk further as she felt it was futile.

Lillian Ortiz, Frank G. and appellant were arrested for the offense on April 12. Appellant was questioned and denied knowing the victim and denied involvement in the killing. Frank G.'s car was seized and identified by Balderas as the car which was driven on the night of the murder.

Detective Singleton testified at trial that no curb feeler had been found on Frank's car, nor was there any evidence that one had been there.

Detective Singleton also indicated that a lime green, mid-sixties, "low-rider" vehicle with "rocket-type mags" had been suspected and that rubber molding with lime green paint on it had been found at the scene several days after the body had been found.

The defense consisted of alibi testimony and testimony tending to impeach and discredit the prosecution's principal witness, Balderas.

In addition to the testimony of Sandra Garcia regarding the victim's being with Larry Montez just before the murder, appellant called his mother, Veronica G., who testified that she knew appellant was at home all day Sunday because he was there when she left for work and when she called home during the early evening. On Monday, March 13 (the day of the murder), appellant visited

the Acostas twice, once at 11:30 a.m. and again around 2 p.m. At about 4 p.m. appellant went with his mother, brother and sister-in-law to look at cars for his brother. He returned with his family and spent the evening of Monday, March 13, at home. On Tuesday, March 14, his mother gave him a check to buy a concert ticket. Veronica testified that the only belt appellant owned was a beige Boy Scout belt .

Margie Acosta confirmed Veronica's testimony as to visits made by appellant to her home. She also testified that the belt involved in the murder was not appellant's.

Rachel Ortiz testified that she saw appellant's brother, Frank G., whom Balderas testified was present when the murder occurred, Saturday and they went to Sammy Garcia's and spent the night. They went riding and then returned to Sammy's. Sunday night they went to the El Morocco Motel and spent the night. On Monday, March 13, they went to see Frances Gonzales and then went to Sammy's. On Monday night, Frances and a man named Raymond stayed with Frank and Ms. Ortiz at the motel.

David Maceas, Lillian's boyfriend, testified that he had been with her on Monday because he remembered taking her to the cleaner's on Tuesday and seeing police cars at the cemetery.

Frank G. testified that he registered at the El Morocco Motel on Sunday as John Lopes. A motel registration corroborating his testimony was introduced into evidence.

Arg Rogers testified that she saw the victim on Sunday, March 12, at 11 at her home. She testified that the victim

was at her house again on Monday at 12 and left with a guy in a truck. She saw the victim later with another man in a truck. The victim returned at about 2 or 3 p.m. She left at 6 p.m.

Mary Anne Ramos, Mrs. Rogers' granddaughter, testified that she last saw the victim on Monday at 6:15 p.m. She had borrowed a black belt from Ms. Ramos.

Dr. Dominick Ambrosecchia of the coroner's office testified that the cause of death was asphyxiation due to a belt tied around her neck and multiple traumatic injuries. Contrary to Ms. Balderas, Ambrosecchia also testified that the belt could not have been turned from back to front as it was so tight that doing so would have caused abrasions. He saw no evidence that blood had flowed from the victim's nose. He also testified that the marks on the victim's back were not consistent with a car running over her. He thought it was unlikely that the victim's body could have been flipped over by running over it with a car.

Frank Dobesh, Superintendent of Union Cemetery, testified that there are no lights in the cemetery and the closest lights are street lights located about 100 yards outside the cemetery.

Frances Devora testified that the victim and Lillian Ortiz were on extremely bad terms and that she would be very surprised to see them together. In contradiction to Balderas' testimony, Ms. Devora also testified that Frank G. and appellant did not attend services for the victim and that it was Frances' sister, Victoria, who placed a black rose on the coffin. Victoria Devora confirmed this testimony.

When confronted with prior inconsistent statements, Balderas repeatedly did not recall making them or admitted she had made them up. Balderas did not remember having said that "they ran over her first and then strangled her." She denied saying that "[t]hey wanted to rape her after she was dead but they didn't have the guts to." She also stated she lied when she said that she heard Lillian Ortiz say she finished the victim off.

Ms. Balderas testified that before the killing she took a friend who wanted to buy angel dust to meet "Fat Eddie," Frank G. and appellant. Fat Eddie, Frank G. and appellant took the money without giving them any drugs and left for good. Ms. Balderas called her brother and got some grenades and guns together to go after them.

Balderas also testified that she had had a fight with Liz Moore in which she had stabbed her, and a fight with Lillian during which she shot her twice because Lillian had been going out with her boyfriend.

Balderas testified that there were two pole lights at the cemetery. She stated that she lied when she told the police that a "black guy" killed the victim; that appellant was driving; and that everyone had sex with everyone else that night. She also testified that she remembered telling police that blood was coming from the victim's nose but didn't remember if this was true.

By way of rebuttal respondent presented evidence that after appellant had been arrested he and his mother were placed in a room in the Bakersfield Police Department which was equipped with a monitoring device. During the

conversation between appellant and his mother, his mother said that they would find out who started all the trouble for appellant and that the person would pay for it. She also said that, "I am going to find out what date they say this girl is supposed to have been killed. That way I can go back and remember, remember where you were. [¶] I know you were home."

DISCUSSION

Preliminarily we note that most of appellant's brief consists of a scholarly discourse on the constitutionality of depriving appellant of a jury trial and of the substantial evidence rule as he perceives it.

Adverting first to the jury trial discourse, it is settled as of now that ". . . neither the state nor the federal Constitution guarantees a jury trial in a juvenile proceeding." (*People v. Superior Court* (*Carl W.*) (1975) 15 Cal. 3d 271, 274; *In re Roger S.* (1977) 19 Cal.3d 921, 938; *Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 376; *In re Daedler* (1924) 194 Cal. 320, 332; *McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 545.) We are bound by these decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Turning next to the substantial evidence rule, it is undoubtedly true that there have been some misquotations and misapplication of the rule as well as distortions of it by the quotation of selected parts to fit the factual situations in particular cases. Nevertheless, the true scope and import of the rule has been made clear by leading Supreme Court decisions. Because considerable argument has been devoted to the subject by the parties, it is necessary to

quote at some length from leading California cases on the subject before proceeding to a consideration of whether the California standard of review has been changed by the recent United States Supreme Court case of *Jackson v. Virginia* (1979) ..... U.S. ..... [99 S.Ct. 2781].

The leading case in this area is *People v. Redmond* (1969) 71 Cal.2d 745, 755-756, which instructs:

> "This court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.]
>
> "Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.] Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. [Citations.]
>
> "In *People v. Bassett*, 69 Cal.2d 122, 139 [70 Cal. Rptr. 193, 443 P.2d 777], we recently pointed out that, in considering the sufficiency of evidence purporting to connect the defendant with the crime, '*the appellate court is required to determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt* [citations]. The prosecution's burden is a heavy one: "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." [Citation.] Accordingly, in determining whether the record is sufficient in this respect the appellate court can give credit only to "substantial" evidence, i.e., evidence that reasonably inspires confidence and is "of solid value."' As *Bassett* points out, this rule has also been applied in numerous cases involving the sufficiency of evidence as to matters other than identification. [Citation.]" (Emphasis added.)

Redmond has been cited and all or parts of its language has been repeated in substance in numerous subsequent cases. (See *People v. Reyes* (1974) 12 Cal.3d 486, 496-497; *People v. Vann* (1974) 12 Cal.3d 220, 225; *People v. Culver* (1973) 10 Cal.3d 542, 548; *People v. Kunkin* (1973) 9 Cal. 3d 245, 250; *In re Roderick P.* (1972) 7 Cal.3d 801, 808-809; *People v. Reilly* (1970) 3 Cal.3d 421, 425.)

Reyes and *Kunkin* require particular note. In *Reyes* the court equated the substantial evidence rule with the standard of "'a reasonable trier of fact'" determining whether the "'. . . prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.'" The court stated:

> "There is merit to Venegas' contention that the evidence adduced at trial is insufficient to support the judgment rendered against him. In reviewing a criminal conviction, an 'appellate court *must determine whether a reasonable trier of fact could have found*

the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.' [Citations.] The substantial evidence rule is our yardstick for determining whether a verdict meets this minimal standard of reasonableness: 'The test on appeal becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.' [Citations.] To be considered substantial, evidence must be of the type which 'reasonably inspires confidence and is "of solid value."' [Citation.]" *People v. Reyes, supra,* 12 Cal.3d at pp. 496-497.) (Emphasis added.)

In *Kunkin,* after reciting the substance of the rule, the court states:

"The substantial evidence rule mandates consideration of the weight of the evidence before deferring to the conclusions drawn from the evidence by the trier of fact." (*People v. Kunkin, supra,* 9 Cal.3d at p. 250.)

Implicit in the appellate court's duty to consider the weight of the evidence and to determine " '. . . whether a reasonable trier of fact could have found the prosecution sustained its burden of proving defendant guilty beyond a reasonable doubt' " (*People v. Reyes, supra,* 12 Cal.3d at p. 496) is the obligation to review the whole record. In no other way can the court determine whether evidence merely raises a suspicion of defendant's guilt or reasonably inspires confidence and is of solid value. If the court did not review the whole record it would be faithless to its duty under the rule. Accordingly, appellant's contentions that the substantial evidence rule in California does not require the appellate court to look at the whole record

and that its duty is satisfied upon the discovery of *any evidence* to support the verdict are without merit.

In *In re Roderick P., supra,* 7 Cal.3d 801, 808-809, the substantial evidence rule as articulated in *Redmond, supra,* was held applicable to juvenile court proceedings.

It remains to determine whether under *Jackson v. Virginia, supra,* ..... U.S. ..... [99 S.Ct. 2781] a more stringent standard is required by the United States Constitution.[1] *Jackson* was a federal habeas corpus proceeding in which the federal Court of Appeal had applied the "no-evidence" criteria of *Thompson v. Louisville* (1960) 362 U.S. 199 to a state conviction of murder and denied the writ. In *Thompson v. Louisville, supra,* the court held that the writ should be denied if there was *any* evidence to support a state court conviction.

The *Jackson* court held that as a matter of due process the standard for evaluating the sufficiency of evidence is whether any rational trier of fact could find guilt beyond a reasonable doubt, stating:

"But this inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' *Woodby v. INS,* 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362. Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana,* 406 U.S. 356, 362, 92 S.Ct. 1620, 33 L.Ed.2d 152. This familiar

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[1]The respondent concedes that the standard of *Jackson* is binding on the California courts.

standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law.[13]" (*Jackson v. Virginia, supra,* ..... U.S. ..... [99 S.Ct. at pp. 2789-2790]; fn. 12 omitted.)

In footnote 13 the court further elaborates:

"The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known. See generally 3 Wharton's Criminal Procedure § 520 (1975 and Supp. 1978)." (99 S.Ct. at p. 2790.)

The language in *Jackson* is so close to that used in *Redmond* and subsequent cases as to be indistinguishable in impact or application. The only semantic difference is that the United States Supreme Court in *Jackson* used the word "rational" in its formulation, whereas the California Supreme Court has used the word "reasonable." The words are synonymous. (Webster's New World Dict. (2d College ed. 1972) pp. 1179, 1183.) Accordingly, we hold the California substantial evidence test has not been changed by *Jackson* and that it comports with due process of law.

Applying the foregoing test to the facts of the instant case, we are impelled to conclude that upon examination of the whole record the evidence was sufficient to support the juvenile judge's determination that appellant violated Penal Code section 187 and in concluding it was murder in the second degree (Pen. Code, § 189).

Balderas' sworn statements at trial amount to eyewitness testimony that appellant committed the offense at hand. The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. (Evid. Code, § 411;[2] *People v. Robinson* (1964) 61 Cal.2d 373, 389; *People v. Matlock* (1959) 51 Cal.2d 682, 695; *People v. Maxwell* (1979) 94 Cal.App.3d 562, 574-577.)

While Balderas admits she did not actually see appellant knot the belt around the victim's neck she did observe appellant to lasso the victim around the neck with a belt. She observed them struggling and the victim falling to her knees. Balderas was in back of appellant while he and the victim struggled when the victim attempted to get the belt off from around her neck. She observed the victim fall to the ground and cease struggling. Appellant stood up and said, "like he was crying," "Oh, my God, I've killed her." Balderas saw that the belt had been tied around the victim's neck and knotted in the back. Balderas did not ob-

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[2]Evidence Code section 411 provides:

"Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

serve anyone else in a position to have been able to contribute to the strangulation of the victim. Moreover, his oversensitive sexual macho had been sullied by the victim's stinging remarks in the presence of the others regarding his inability to have sexual intercourse. Sandra Garcia corroborated that there was sufficient light to see and that the car subsequently ran over the victim's body and at one point two women were fighting.

The testimony of Balderas constitutes substantial evidence to support appellant's conviction.

The thrust of appellant's argument, both below and in this court, is directed toward discrediting the testimony of Balderas. Appellant urges that as a matter of law it does not reasonably inspire confidence and is not of solid value. In doing so he impliedly implores this court to independently determine from the whole record whether the evidence was sufficient to conclude that appellant is guilty beyond a reasonable doubt. As heretofore explained, this goes beyond our duty, it being limited to determining whether there is sufficient evidence upon which a reasonable trier of fact could have found the prosecution sustained its burden of proving defendant guilty beyond a reasonable doubt. It is not our function to reweigh the evidence, reappraise the credibility of witnesses or redetermine factual conflicts, those functions being within the province of the trier of fact. (*People v. Culver* (1973) 10 Cal.3d 542, 548; *People v. DePaula* (1954) 43 Cal.2d 643, 649; *People v. Huston* (1943) 21 Cal.2d 690, 693 (disapproved on other grounds in *People v. Burton* (1961) 55 Cal.2d 328, 352).) The limitation in this regard is that the

appellate court will not uphold a verdict based upon evidence which is inherently improbable and thus may reject evidence believed by the trier of fact if there exists either a physical impossibility that it is true or the falsity of the evidence is apparent without resorting to inference or deduction. (*People v. Mayberry* (1975) 15 Cal.3d 143, 150; *People v. Huston, supra,* 21 Cal.2d 690, 693.) There is nothing in this record rendering Balderas' version inherently improbable, physically impossible or legally unbelievable.

Appellant argues that her testimony could not be considered substantial evidence because: (1) she was an accomplice whose testimony must be viewed with distrust; (2) because of the promise of immunity she had an interest in testifying against appellant; (3) at the time of the events she observed she was under the influence of drugs; and (4) the contradictions inherent in her testimony and between her testimony and other evidence in the case makes her entire testimony unbelievable.

The rule requiring corroboration of an accomplice's testimony (see Pen. Code, § 1111) is not applicable in a juvenile court proceeding. (*In re Mitchell P.* (1978) 22 Cal. 3d 946.) Moreover, Balderas was not technically an accomplice in this case. An accomplice is one "who is liable to prosecution for the identical offense charged against the defendant. . . ." (Pen. Code, § 1111.) There is no evidence to suggest that Balderas aided appellant in the commission of the offense.

Contrary to appellant's statement, Balderas did not testify under a promise of immunity from prosecution for the

crime but during trial was given immunity with respect to her testimony regarding her use of drugs. Whatever bias she had as a result of favors she was offered in return for her testimony or her own personal interest in the outcome, like her use of drugs before the murder, merely goes to her credibility and does not render her testimony unbelievable as a matter of law.

Lastly, appellant points to numerous contradictions of and internal inconsistencies in her testimony. The principal conflicts are: Sandra Garcia testified that she only saw two women arguing and fighting. Also contrary to Balderas' testimony, appellant's mother testified that she was with appellant on the night of the murder. Rachel Ortiz and Frank G. both testified that Frank G., whom Balderas testified was at the cemetery when the victim was killed, was elsewhere on the evening of the murder. David Macias testified that Lillian was with him Monday.

The testimony of the pathologist was inconsistent with some parts of Balderas' testimony. Balderas testified that they ran over the victim's body with the car. The pathologist testified that marks on the victim's body were not consistent with having been run over by a vehicle. However, this aspect of appellant's testimony was confirmed by Ms. Garcia, who testified that whoever did the killing ran over the body. Balderas also testified that as a result of running over the body it was turned. The pathologist testified that running over a body was unlikely to result in its turning. Balderas further testified that she went back after the incident and twisted the belt around. The pathologist testified that such an action would have caused abrasions

which were not present on the body. Balderas testified that she observed blood come from the victim's nose. An expert testified that no trauma to the nose was observed during the autopsy.

Balderas testified that the victim used heroin on the morning of the murder. An expert testified that it was unlikely that such narcotics could be flushed from the bloodstream in only eight hours. However, the victim's mother testified that she last saw the victim at 6 o'clock that evening. That was well over the eight-hour period covered by the stipulation. Therefore, this does not constitute an actual contradiction. Balderas testified that appellant used his belt to strangle the victim. Margie Acosta testified the belt used to strangle the victim was not appellant's. Balderas testified that there were pole lights in the cemetery. In fact, no such lights existed. Nevertheless, there were lights 100 yards away, which were sufficient for Sandra Garcia to be able to see what occurred from a distance.

Lastly, Balderas admitted that she gave prior false statements to police as to what happened on the night of the murder.

The above contradictions relate primarily to events which occurred either before or after the actual murder. They are independent of and separable from the version of events testified to by Balderas which constituted the substantial eyewitness testimony against appellant. Those contradictions do not render her testimony impossible or unbelievable but only create a conflict in the testimony and go to Balderas' credibility, which is for the trial court to evalu-

ate. The version given by Balderas is not inherently improbable or impossible, and the court's determination to accept it is sustainable on appeal.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

/s/ BROWN (GEO. A.)

P.J.

WE CONCUR:

/s/ FRANSON

J.

/s/ ZENOVITCH

J.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-989

FREDERICK JOSEPH G.,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO THE WRIT

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INTRODUCTION

This brief is written in reply to the Response to the Petition for Certiorari filed by the Attorney General of California. It's purpose is to point out certain major legal and factual omissions in that document, and to demonstrate how the arguments advanced serve to place in sharper relief the importance of the merits of this case.

I

RESPONDENT CONCEDES, IN EFFECT, THAT THE CALIFORNIA JUVENILE COURT, IN MAJOR FELONY CASES, HAS BECOME NO MORE THAN A SPECIALIZED SYSTEM OF PENAL JUSTICE

Respondent characterizes the effect of the Court's decision in *McKeiver* v. *Pennsylvania* (1971) 403 U.S. 528, as permitting "further experimentation with progressive methods of rehabilitation" (Resp. Br. 28)* but then goes on to concede that under California law, the "concepts of rehabilitation and punishment cannot wholly be separated. . . . [I]t is to his benefit to be confined so that he cannot engage in additional similar acts . . ." (Resp. Br. 36.) Respondent has, of course, done no more than articulate the traditional concepts of incapacitation and deterrance, which are the classic hallmarks of criminal punishment. (*United States* v. *Brown* (1965) 381 U.S. 437, 458; Petn. 16-17.)

Respondent next goes on to argue in tedious detail that the present statutory scheme of trial before referees and judges is such an integral part of the California juvenile court law that it cannot be severed from it, and that juries are incompatible with the scheme. (Resp. Br. pg. 36 ff.) Specifically, he maintains there would be a prohibitive cost were it necessary to have a jury trial before a referee and another before a judge. (Resp. Br. 47.)

In making this laughable argument, respondent

* Page references are to the unprinted edition of respondent's brief in opposition.

rather carefully neglects to note the recent invalidation of the "inseverable" referee system on state constitutional grounds by the California Supreme Court. (*In Re Perrone C.* (1979) 26 Cal.3d 49, ___ Cal.Rptr. ___.) Contested juvenile criminal cases are now tried exclusively before judges of the Superior Court, and it is only a minor administrative task to place such trials in courtrooms equipped with a jury box—which is where they are held in a great many locations already.[5]

In making such an argument, respondent also reveals that the principal motive for his resistance to trial by jury is official concern over cost and administrative inconvenience, not any sincere belief that doing so serves the interests of minors, especially those wrongfully accused of a crime. It can be said that this Court has never allowed the evasion of Constitutional requirements upon the assertion that compliance is inconvenient: were such grounds acceptable, there would be no need for trials at all.

(a) Respondent Reads *McKeiver* As Authorizing Life Imprisonment Without Trial By Jury

Finally, respondent closes his discussion of the jury issue with his discovery of a New Jersey statute which permits a sentence of life imprisonment, without trial by jury, for persons found to have committed homicide during their minority. (Resp. Br. 50-51)[6] In pointing this

[5] In the largest California counties, juvenile courts are sitting in regular criminal court houses; in small ones, a superior court judge usually sets aside certain days each week to hear juvenile matters in his regular courtroom.

[6] California, in effect, permits similar life imprisonment of *any* minor committed to the Youth Authority, with a right to bi-annual judicial review, by jury if desired, on the narrow question of whether the individual poses a physical danger to the public. (Welf. and Inst's. Code § 1800 ff.)

Contrary to respondent's suggestion, a hearing under section 1800 does *not* afford a right to litigate one's guilt of the commitment offense before a jury.

out, respondent has provided exactly the *reductio ad absurdum* needed to illustrate our contention that when a juvenile court orders confinement past the age of majority, it becomes a criminal court for purpose of the Sixth and Fourteenth Amendments: It is ludicrous enough to attempt to justify an initial term of imprisonment in a penal institution to age 23 as being in furtherance of some parental function. New Jersey would carry this to age 50 or even 70.

The Illinois legislature, perhaps more mindful of its constitutional responsibilities, has enacted a new statute to deal with major offenses by juveniles effective January 1, 1980. It authorizes detention in a state correctional institution to age 21 upon conviction for certain crimes, and grants the right to trial by jury to the accused. There is no provision for extension of confinement past age 21. [Ill. Pub Act 81-1104, 37 Ill. Annot. Stat. § 705–12(4)]

When the threshold of adulthood is crossed by a "juvenile" court, to borrow a phrase from Mr. Justice Harlan, it becomes merely a "system[] of specialized penal justice [which] might permit erosion, even evasion, of the limitations placed by the Constitution upon State Criminal proceedings." (*In re Gault* (1967) 387 U.S. 1, 68 [Harlan J., Concurring in the Judgment].)

II

THE CALIFORNIA "SUBSTANTIAL EVIDENCE" TEST, AS APPLIED HERE, IS AN *ANY* EVIDENCE TEST

Respondent maintains that "it is well settled that to render a conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment, the conviction must be 'totally devoid of evidentiary support'. (*Garner* v. *Louisiana* (1961) 368 U.S. 157.)"[7] He then proceeds to the conclusion, citing the opinion of the Court of Appeal (Resp. Br. 17-18), that this Court's opinion in *Jackson* [*v. Virginia* __ U.S. __, 99 S.Ct. 2781,] did not announce a new rule of appellate review for California.

Respondent fails, of course, to recognize that the Court of Appeal applied *Jackson* to this record to reach the astonishing conclusion that affirmance is compelled by an isolated statement by a witness who obviously fabricated most of her testimony, and who was openly declared incredible by the trial judge,[8] because it merely appeared there was no "physical impossibility that it is true or the falsity of the evidence is apparent without resorting to inference or deduction." (Opinion, App. A to petn. at 21.)[9]

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[7] *Garner* was a sit-in case in which a group of Negroes were convicted of disturbance of the peace for sitting quietly at a counter and asking for a glass of iced tea.

[8] "THE COURT: Like a jury, I don't have to explain my judgment. That's it. But I will say that although I didn't believe everything Connie Balderas testified to, I do believe that what occurred in the cemetery did occur . . ." (RT 452.)

[9] Respondent Concludes: "Her [Connie Balderas'] testimony concerning the murder is not inherently improbable and it was never established that there is a physical impossibility that her testimony is true nor is the falsity of her testimony apparent without resorting to inferences or deductions." (Resp. Br. 24.)

What this means is that as long as a single line of incriminatory testimony can be pulled from the record which is consistent with Newtonian physics, a judgment must *automatically* be affirmed. This is indeed an any evidence test, and is identical to pre-*Jackson* practice in California. (Petn. 24-25.)

The California Courts' reading of *Jackson* as being a mere restatement of the "any evidence" standard is in error. Since that incorrect formulation has been accepted by all the courts of California,[10] it is deserving of correction by this Court if for no other reason than to ease the overloaded habeas corpus dockets of the federal courts (cf. Stevens., J., dissenting in *Jackson, supra,* — U.S. —, 99 S.Ct. at 2798.)

a. The Facts: Respondent Illustrates That Convictions Can Rest Upon Irrelevant Evidence Under Present California Practice

By arguing to this Court, as he successfully did below, that petitioner's guilt was corroborated by the presence of a vehicle at an uncle's house which had no connection with the crime, respondent only succeeds in illustrating our contention that there is something dangerously out of order as concerns factfinding in California Juvenile Court proceedings: Irrelevant evidence may be used to obtain convictions from trial courts and affirmances on appeal.

[10] The California Supreme Court has cited the Court of Appeal's opinion in this case with approval in *People* v. *Johnson,* (1980) 26 Cal.3d 557, 576, _Cal.Rptr._. (See Resp. Br. 20.)

Respondent relies on the fact that an apparently inoperative (RT 43) 1958 Chevrolet with no curb feelers was found at the residence of petitioner's uncle a month after the crime. Respondent implies that this circumstance should somehow support an inference of petitioner's guilt.

Respondent neglects to acknowledge that the investigator who located this vehicle admitted it was *not* the vehicle suspected in the crime: the suspect vehicle was lime green. (RT 41.) A curb feeler and a piece of rubber molding with lime green paint on it were found at the scene. (RT 42.) These items were believed to have come from the vehicle involved in the crime. (RT 40.)

The color of the vehicle found at petitioner's uncle's house was *not lime green* (RT 42); moreover, it was inspected for indications that a curb feeler had once been attached to it, and *none were found.* (RT 40.) No evidence was presented that petitioner or any member of his family owned a lime green vehicle, and no evidence was presented that the 1958 Chevrolet was involved in the crime.

In most cases, when a particular fact is advanced as justification for a judgment or verdict, the particular fact is something which is logically consistent with the conclusion. This is because ordinarily, judicial factfinding is a rational process.

CONCLUSION

The facts of this case, and the manner in which California prosecutorial and judicial authorities have dealt with them, proves once again that the framers of our Constitution were wise indeed when they guaranteed those accused of crime a trial before a group of citizens who, being not possessed of the legal mind, retain at least their common sense. Minors facing consequences such as were inflicted on petitioner should not be denied the benefit of that wisdom any longer.

This Court should reaffirm that the Sixth Amendment is far more than a technicality.

DATED: March 31, 1980

Respectfully submitted

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